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# REPORTS

OF

# CASES

ARGUED AND DETERMINED

IN THE

# COURT OF APPEALS

OF

# MARYLAND,

In 1826 & 1827.

BY THOMAS HARRIS,
Clerk of the Court of Appeals,
and
RICHARD W. GILL,
Attorney at Law.

VOLUME I.

HEINRICH & ALLEN

ANNAPOLIS:
PRINTED BY JONAS GREEN.
1828.

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# ERRATA.

| PAGE. | LINE. | |
|---|---|---|
| 7 | 12 | For *appeal* read *appear.* |
| 11 | 20 | After *property* insert a comma, and erase the comma after *necessity.* |
| | 39 | For *defendant* read *defendants.* |
| 26 | 7 | For *herein* read *therein.* |
| 34 | 20 | For *November* read *December.* |
| 96 | 27 | For *and* read *an.* |
| 111 | 32 | For *decision* read *sense.* |
| 120 | 13 | After *Gaunt* erase the inverted commas. |
| 130 | 9 | After *estates* insert *tail.* |
| 142 | 2 | After *wife* insert *stated to be.* |
| 152 | 26 | Insert the inverted commas after *appear,* and erase them before *This* |
| 153 | 22 | For *vendee's* read *vendees.* |
| 156 | 28 | For *being* read *been.* |
| 176 | 7 | After *&c.* insert, *and should in the meantime renew the said notes at the end of every 60 days, and pay the regular interest or discount upon the same, &c.* |
| | 11 | After *due* erase the words above directed to be inserted. |
| 237 | 12 | After *was* insert *an.* |
| | 23 | For *to* read *of.* |
| 308 | 14 | After *as* insert *a.* |
| 321 | 31 | For *appellee* read *appellants.* |
| 323 | 8 | For *Flannagan* read *Carman.* |
| 409 | 24 | After *laws* erase the inverted commas. |
| 413 | 7 | For *evidence* read *evidenced.* |
| 420 | 9 | For *prisoners* read *prisoner.* |
| 442 | 13 | After *running* insert *with.* |
| 468 | 13 | Erase *and* |
| | 14 | For *are* read *being* Erase *it.* |
| 470 | 28 | For *drawer's* read *drawee's.* |
| 488 | 38 | After *reported* insert *in.* |
| 492 | 8 | For *become* read *became.* |
| 511 | | tit. ASSUMPSIT, 6, line 4. After *and* insert *been.* |

# NAMES OF THE JUDGES, &c.

## DURING THE PERIOD COMPRISED IN THIS VOLUME.

### OF THE COURT OF APPEALS.

Hon. John Buchanan, Chief Judge.
Hon. Richard Tilghman Earle, Judge.
Hon. William Bond Martin, do.
Hon. John Stephen, do.
Hon. Stevenson Archer, do.
Hon. Thomas Beale Dorsey, do.

### OF THE COURT OF CHANCERY.

Hon. Theodorick Bland, Chancellor.

### OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles* and *Prince-George's* Counties.

Hon. John Stephen, Chief Judge.
Hon. Edmund Key, Associate Judge.
Hon. John Rousby Plater, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen-Anne's* and *Talbot* Counties.

Hon. Richard Tilghman Earle, Chief Judge.
Hon. Lemuel Purnell, Associate Judge.
Hon. Robert Wright, do.
Hon. Philemon B. Hopper, do. *(a)*

THIRD JUDICIAL DISTRICT—*Calvert, Anne-Arundel* and *Montgomery* Counties.

Hon. Thomas Beale Dorsey, Chief Judge.
Hon. Charles J. Kilgour, Associate Judge.
Hon. Thomas H. Wilkinson, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset* and *Worcester* Counties.

Hon. William Bond Martin, Chief Judge.
Hon. James B Robins, Associate Judge.
Hon. William Whittington, do.
Hon. Ara Spence, do. *(b)*
Hon. William Tingle, do. *(c)*

FIFTH JUDICIAL DISTRICT—*Frederick, Washington* and *Allegany* Counties.

Hon. John Buchanan, Chief Judge.
Hon. Abraham Shriver, Associate Judge.
Hon. Thomas Buchanan, do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* Counties.

Hon. Stevenson Archer, Chief Judge.
Hon. Charles W. Hanson, Associate Judge.
Hon. William H. Ward, do.

### OF BALTIMORE CITY COURT.

Hon. Nicholas Brice, Chief Judge.
Hon. William M'Mechen, Associate Judge.
Hon. Alexander Nisbet, do.

### ATTORNEY GENERAL.

*Thomas Kell*, Esquire.

*(a)* Appointed the 25th of October 1826, in the place of Judge *Wright*, deceased.
*(b)* Appointed on the 25th of October 1826, to fill the vacancy occasioned by the death of Judge *Robins*.
*(c)* Appointed on the 9th of March 1827, to fill the vacancy occasioned by the death of Judge *Whittington*.

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# CASES

## ARGUED AND DETERMINED

IN THE

# COURT OF APPEALS

OF

# MARYLAND.

JAMES, *et al.* Lessee, *vs.* BOYD.—June Term, 1826.

The lessor of the plaintiff in ejectment died pending the action, and his heirs at law were made parties in his place, without objection, and the cause continued several terms, and the plots amended—*Held*, that it was not competent for the defendant to defeat the action by giving evidence that one of the heirs was an infant when she was made a party; and that evidence that she was an infant at the time of the trial, would not entitle the defendant to a verdict against the other heirs who were of full age.

APPEAL from *Harford* County Court. Ejectment on the demise of *Isaac Henry*, for a tract of land called *Pleasant Plains*. The defendant, (the appellee,) took defence on warrant, and plots were returned. The death of *Isaac Henry*, the lessor of the plaintiff, was suggested; and *Sedwick James*, Junr. and *Elizabeth* his wife, *John Litton Henry*, *Samuel Henry*, *Robert Henry* and *Mary Henry*, claiming to be heirs at law and representatives of the said *Isaac Henry*, the lessor of the plaintiff, upon their prayer, were, by order of the court, admitted in the place and stead of said *Isaac Henry*, lessor as aforesaid, &c.

At the trial the defendant gave in evidence, that *Mary Henry*, one of the lessors of the plaintiff was, at the time she was made a party in the cause, an infant and under age; and thereupon prayed the court to direct the jury to find a verdict for the defendant. Which direction the Court, [*Hanson* and *Ward*, A. J.] thereupon gave. The plaintiff excepted; and

the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE and DORSEY, J.

*C. S. W. Dorsey* and *Gill*, for the Appellant, contended—1. That under the act of assembly of 1785, *ch.* 80, *s.* 2, it is the duty of the court, in an action of ejectment, where a new party is made under a suggestion of death, if such new party be proved to be an infant, to continue such action, unless the defendant require the same to be abated.

2. That the *second* section of the above act does not apply to this case; and therefore the court below erred in the instruction given to the jury.

3. That the new parties were properly made under the *first* section of the above act.

4. That if a party, when appearing to an action of ejectment under this act, be an infant; yet if it does not appear that he was an infant when the jury was sworn, the court have no right either to continue or abate the suit under the *second* section of that law.

On the *first* point, they cited 1 *Bac. Ab.* tit. *Abatement*, 13. *Thurstout vs. Grey*, 2 *Stra.* 1056. *Kinney vs. Beverly*, 1 *Hen. & Munf.* 531. *Howard vs. Moale, et al. Lessee*, 2 *Harr. & Johns.* 249, 280, per *Nicholson*, J. 2 *Sellon's Pr.* 136.

On the *second* point—*Zouch vs. Parsons*, 3 *Burr.* 1806. *Runn. Eject.* 188. 3 *Com. Dig.* 548, *(New Ed.) Anonymous*, 1 *Wils.* 130. *Noke vs. Windham*, 1 *Stra.* 694. *Throgmorton vs. Smith*, 2 *Stra.* 932. *Anonymous*, 1 *Cowp.* 128.

On the *third* point—*Shivers vs. Wilson*, 5 *Harr. & Johns.* 130.

On the *fourth* point—3 *Com. Dig.* 551. *Foxurst vs. Tremaine*, 3 *Saund.* 213.

*Speed*, for the Appellee cited *Co. Litt.* 135, b. (note 1.) Stat. *West.* 1. The act of 1785, *ch.* 80. *Motteux vs. St Aubin*, 2 *W. Blk.* 1133. *Pechey vs. Harrison*, 1 *Ld. Raym.* 232; and the act of 1801, *ch.* 74, *s.* 38.

The opinion of the Court was delivered by

EARLE, J. *Isaac Henry*, the lessor of the plaintiff in this case, died pending the action, and his heirs at law were made parties in his place, without objection on the part of the defendant. The cause was continued for several terms after, and the plots filed therein underwent alterations and amendments. At the trial the defendant, by a witness, proved, that *Mary Henry*, one of the heirs, at the time she was made a party, was an infant and under age; and by his counsel he then moved the court to direct the jury to find a verdict for him; which direction the court accordingly gave. This direction is now complained of, and there does not rest, on our minds, a particle of doubt, that it was erroneous. To arrive at this conclusion it is not necessary to examine the question so much pressed on the argument, whether at common law an ejectment abates by the death of the lessor of the plaintiff; nor need we enquire whether an infant lessor must prosecute an ejectment by attorney, or next friend; it is enough for us to know, that the testimony of the defendant had no bearing upon the issue joined between the parties, was calculated to operate a complete surprise upon the plaintiff, and did not answer the purpose for which it was introduced; that is to say, did not prove the suit prosecuted by a party who was incompetent, from nonage, to prosecute it. Whatever *Mary Henry's* age might have been when she was made a party to the suit, it is not established by evidence, that she was an infant at the time of the trial. As her age, when she appeared as one of the heirs of her ancestor, is unascertained, it is as fair to conclude, that she arrived at full age before the trial, as that she remained a minor until that period. But if it was conceded, that *Mary Henry* was an infant at the time of the trial, ought the court, for that reason, to have directed the jury to find for the defendant, not only against such infant, but against the other new lessors of the plaintiff who were of full age? The court are acquainted with no principle of law to sanction such a decision, and therefore must reverse the judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## VANDERSMITH *vs.* WASHMEIN'S Adm'r.—June, 1826.

After verdict in an action of *assumpsit*, by an administrator, a defective allegation in the declaration, of the promise to the administrator, and the death of the intestate, and an omission to make *profert* of the letters of administration, cannot be taken advantage of, though they might have furnished good causes of demurrer.

W, being taken sick at the house of V, deposited in his hands an amount of money, and directed V to send for a physician, to furnish him with every thing that was necessary, and to apply the money to the payment of the physician's bill, and of any expenses which might be incurred on his account during his sickness. V did send for a physician, and furnished W with every necessary and attendance during his sickness, which in a few days ended fatally. On his death V paid for all the expenses, including the physician's bill. In an action of *assumpsit* brought against him by W's administrator, to recover the amount of the deposit. *Held*, that V was to be allowed for the amount paid the physician, if it was such as he was entitled to receive, as well as the other expenses. That the fund placed in his hands by W, was to be considered as a special fund, and that in relation to it he was to be looked upon as a trustee, or agent, of the physician, for whose remuneration it was in part created; but that it would have been otherwise if V had received the deposit for safe-keeping only.

APPEAL from *Baltimore* County Court. Action of *Assumpsit* for money paid, laid out and expended; had and received; lent and advanced; and on an *insimul computassent*. *Non assumpsit* pleaded, and issue joined. At the trial the plaintiff, (now appellee,) offered evidence, that the deceased, upon getting to the house of the defendant, (the appellant,) was taken ill, and there delivered to the defendant the sum $149 50, to be taken care of for him, the deceased. The defendant then offered evidence, by *Peter Vandersmith*, Dr. *Marsh*, and *Benjamin Richardson*, that the deceased arrived at the house of the defendant, and was taken very ill; that in about two or three hours afterwards, he told the defendant that he wished him to send for a physician, and to furnish him with every thing that was necessary, and to apply the cash delivered to him, the defendant, in payment of the physician's bill, and to the discharge of any expenses that might be incurred. That the defendant accordingly sent for a physician, and also went afterwards personally for him. That the physician attended the deceased during his illness, which lasted from Thursday until Saturday, when he died. That during the whole time, he was

furnished with every necessary and attendance. That the defendant immediately after paid the physician's bill, amounting to $50, together with all funeral expenses, and other expenses attending the illness of the deceased, or in consequence of his death, and kept his horses, wagon, and other property, until about eleven days afterwards, when they were delivered to the present plaintiff. That the expenses so incurred, and which were reasonable, were paid between the 31st of August, on which day the intestate died, and the 5th of September 1822, and that administration was obtained on the 17th of June 1823. The plaintiff then prayed the court to direct the jury, that upon the evidence so offered he was entitled to recover the amount of his claim. Which opinion the Court, [*Hanson* and *Ward*, A. J. *(a)*] refused to give; but directed the jury, that the plaintiff was entitled to recover the amount of the money so deposited, after deducting therefrom such sum as they should think a reasonable compensation to the defendant for his attendance and care, and board of the deceased, and the feed of the horses, during the time of the illness of the deceased, and his funeral expenses, but not the physician's bill, or any other expenses. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, STEPHEN, and DORSEY, J.

*R. B. Magruder*, for the Appellant, contended—1. That the physician's bill was not a mere *honorarium*, but was recoverable, and therefore ought to have been allowed to be set off by the defendant below.

2. That the money put in the hands of the defendant below, by the appellee's intestate, was a special deposit for the use of the physician. 1 *Com. on Cont.* 49, 56. 2 *Com. on Cont.* 7, 26. *Temple vs. Welds*, 10 *Mod.* 315. *Dowson vs. Scriven*, 1 *H. Blk.* 218.

3. That the declaration was defective in not setting out properly the promise to the administrator, nor the death of the intestate, and in not making *profert* of the letters of administration.

*(a) Archer*, Ch. J. dissented.

*Meredith*, for the Appellee. To show that it was too late to take advantage of the alleged defect in the declaration, he cited 1 *Chitty's Plead.* 401. He also contended, that the deceased constituted the appellant his agent, but that agency was revoked by his death; and the appellant had, consequently, no right to pay the physician's bill after the death. There is no settled law that a physician's bill for advice is to be paid. The promise in the declaration is laid to the intestate.

BUCHANAN, Ch. J. delivered the opinion of the Court. The objections attempted to be taken to the declaration, that the promise to the administrator, and death of the intestate, are defectively set out, and that there is no profert of the letters of administration, though they might have furnished good causes of demurrer, come too late now, after verdict, and the case must be decided on the bill of exceptions taken at the trial. On which the only question raised is, whether the appellant was entitled to retain any thing on account of the physician's bill?

If the money, which was placed by the intestate, *Frederick Washmein*, in the hands of the appellant, was deposited with him for safe keeping only, and for no other purpose, he then would have had no right to pay any part of it over in discharge of the physician's bill. But the evidence is, that the deceased directed the appellant to send for a physician, to furnish him with every thing that was necessary, and to apply the money placed in his hands to the payment of the physician's bill, and in discharge of any expenses that might be incurred. Now, if the meaning of the deceased was, that in the event of his death, the appellant should pay the attending physician out of the money so placed in his hands, and that formed one of the purposes for which it was lodged with him, (which would seem to have been the case, for it is difficult to suppose, that he intended, in the event of his recovery, that the appellant should be his paymaster,) then it was a special fund, only to be brought into action after the death of the intestate; and the appellant may be considered in the light of a trustee, or agent, of the physician, for whose remuneration the fund was in part created, and was warranted in paying his bill, if indeed the

*amount* was such as he was entitled to receive. We think, therefore, that the court below erred in directing the jury, that the appellant was entitled to no deduction from the amount claimed in the action, on account of the physician's bill.

JUDGMENT REVERSED.

GOVER, *et al.* Lessee, *vs.* COOLEY.—June, 1826.

In an action of ejectment, the plaintiff obtained judgment against the *casual ejector*, and possession by writ, under such judgment. At the second term thereafter, the landlord of one of the tenants in possession, moved the court to set aside the judgment, &c. A rule was granted; and at the next term, the county court set aside the judgment, awarded restitution as prayed, permitted the landlord to appeal, and ordered the action to be reinstated on the docket, and regular continuances entered therein. At this stage of the proceedings, the plaintiff moved the court for a reconsideration, and to set aside the order for restitution, as unduly obtained. This being refused, the plaintiff appealed—*Held*, that the setting aside a judgment against the *casual ejector*, on the motion of the landlord of the tenant in possession, awarding restitution of the premises, and ordering the action to be tried, is but an interlocutory proceeding, from which an appeal will not lie; and the refusal of the county court to reconsider such proceedings, does not alter the case.

APPEAL from *Harford* County Court. Ejectment for a tract of land called *Rupalta*, brought on the 18th of August 1823. Copies of the declaration and notice were directed to, and served on, *Abraham Jarrett*, *Thomas Brown* and *William Russell*, as tenants in possession of the premises, or of some part thereof, to March term 1824, the copies which were directed to be served to August term 1823, having been returned *Tarde*. At an adjournment of March term 1824, viz. on the 12th of June 1824, on motion of the plaintiff, a judgment *nisi* for possession, &c. was entered against the *casual ejector*—the tenants, although called for that purpose, not appearing, &c. Writ of possession issued on the 12th of June 1824, and returned by the sheriff to August 1824, "possession delivered the 14th of June 1824." At March term 1825, a motion was made to the court by *Daniel M. Cooley*, (the appellee,) and *William Russell*, to strike out the judgment rendered by default, and to permit *Cooley*, the landlord of *Russell*, to appear and defend the action, and to award a writ of restitution. This

motion was accompanied with sundry affidavits. A rule was made on the plaintiff to show cause, during the next term, why the judgment should not be set aside, and *Cooley* be admitted to appear and defend the action. At August term 1825, the plaintiff filed certain affidavits; and the court ordered that the judgment rendered against the *casual ejector* be stricken out, and that the writ of possession, issued thereon, be set aside. The court further ordered, that a writ of restitution be issued to give possession to *Cooley* of all that part of the land and premises mentioned in the declaration, which was in the month of October 1823, in the possession and occupation of *Russell*, and which is commonly called *Cooley's Fishery;* that the clerk continue the action from June 1824 until the then term, by regular continuances; and that *Cooley* be admitted to defend the action on the usual terms. *Cooley* then appeared by his attorney, and entered into the common rule, with leave to ascertain his defence; and the plaintiff filed a new declaration against him, in the usual manner, and *Cooley* took defence on warrant, and pleaded not guilty, to which issue was joined. (*a*). At the same term, (August 1825,) the plaintiff filed additional affidavits, and moved the court to reconsider the motion on the part of the defendant, and to set aside the order for a writ of restitution, as unduly and unfairly obtained, without apprizing the court of the death of *Russell*, and of the sale of the interest of *Cooley* in the premises mentioned, before the said motion was made in his behalf as landlord thereof. The court overruled the motion made by the plaintiff; and he appealed to this court.

Motion by the appellee to dismiss the appeal.

This motion was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, and STEPHEN, J.

*Gill*, for the motion, contended, that the judgment appealed from was not final—it was merely interlocutory. The court below have set aside a judgment by default in an action of ejectment, and ordered the case to stand continued—new parties to be made; and the new parties have appeared. This authority is derived, as well from the nature of the action, as the

(*a*) The filing the new declaration, the plea, and joining in issue, the parties admitted to be a mistake in making the record.

act of assembly. Nov. 1787, *ch.* 9, *s.* 6. *Spurrier vs. Yieldhall*, 2 *Harr. & M'Hen.* 173. The judgment does not profess to settle the case finally. It places the parties in *statu quo.* Interlocutory judgments at law cannot be appealed from. *Wilner vs. Harris*, 5 *Harr. & Johns.* 7. Here no right has been finally decided. The refusal of the court to strike out a judgment by default, and suffer the defendant to plead, is not a subject of appeal, and cannot be revised by this court. *Jackson vs. Union Bank*, 6 *Harr. & Johns.* 151, *(note.)* It is the policy of the law to postpone appeals from inferior courts until final judgment; for all errors in the decisions and judgments of such courts, being part of the record, may be corrected in the court of last resort. The motion below having been sustained upon affidavits, which are a part of the record, this court have the means, if they look into the merits, of ascertaining whether it was correctly granted.

*Mitchell*, against the motion, cited *Jackson vs. Babcock*, 17 *Johns. Rep.* 112. 2 *Sellon's Pr.* 107. *Adams on Eject.* 239. *Doe vs. Roe*, 3 *Taunt.* 506. *Doe vs. Davies*, 8 *Serg. & Low.* 37. 2 *Harr. Ent.* 46, 47.

APPEAL DISMISSED.

SEWELL *vs.* SEWELL'S Adm'r. D. B. N.—June, 1826.

The orphans court, at July term 1824, on the petition of J. S, ordered the register to grant him letters of administration on the estate of R S, on his giving bond, with security. On the 13th of September 1824, in the recess of the court, letters were accordingly granted. On the 14th of September, still in the recess of the court, W S, the only surviving brother of the deceased, by his petition, objected to letters being so granted, excepted to such appointment, and prayed an appeal, which was granted by the court on the 13th of October, 1824. The court of appeals dismissed the appeal.

By the act of 1818, *ch.* 204, appeals from the orders and decisions of the orphans courts, must be taken within thirty days after such order or decision.

APPEAL from the Orphans Court of *Calvert* County. At July term 1824, the appellee petitioned the orphans court to grant him letters of administration *de bonis non*, on the estate

of *John R. Sewell*, deceased, inasmuch as he was appointed originally co-executor with the late *Thomas Reynolds*, and resigned only in favour of the said *Reynolds*, who is since dead. He exhibited the will of *John R. Sewell*, dated the 13th of November 1819, whereby he appointed his brother's son, *James J. Sewell*, (the appellee,) with *Thomas Reynolds*, to be his executors. The will was duly proved on the 20th of January 1821, by the subscribing witnesses; and on the 23d of January 1821, *James J. Sewell*, one of the executors named, refused to administer, and by his written communication renounced all right, &c. The orphans court ordered the register to grant letters of administration *de bonis non*, with the will annexed, to *James J. Sewell* (the appellee) on his giving bond with security; and on the 13th of September 1824 letters were, in the recess of the court, accordingly granted. On the 14th of September 1824, in the recess of the court, *William R. Sewell*, (the appellant,) the only surviving brother of the deceased, by his petition objected to letters being so granted, alleging that *John R. Sewell*, deceased, by his will, appointed *James J. Sewell* and *Thomas Reynolds* his executors; that *James J. Sewell* resigned his executorship, and letters were granted to the said *Reynolds*, who is since dead; and that the petitioner is the right and lawful person to whom letters of administration *de bonis non* ought to be granted, as being the only surviving brother of *John R. Sewell*, deceased, and he excepted, and prayed an appeal to this court; which appeal was granted by the court on the 18th of October 1824, and the record transmitted accordingly.

Motion, by the appellee, to dismiss the appeal.

This motion was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*C. Dorsey*, for the Appellee, contended, that the appeal must be dismissed. He referred to the acts of 1798, *ch.* 101, *sub ch.* 2, *s.* 11; *sub ch.* 15, *s.* 18; and 1818, *ch.* 204. He said, that if the appeal could be sustained in a case like this, it had not been made within the time prescribed by law.

*Taney* and *Boyle*, against the motion.

APPEAL DISMISSED.

## S. & T. RINGGOLD *vs.* M. RINGGOLD, *et al.*
## M. RINGGOLD, *et al. vs.* S. & T. RINGGOLD.—June 1826.

Trustees empowered by deed to sell real estate, and with the proceeds pay debts and make investments in stock, are not authorised to exchange the trust property for other real property. By making such exchange, though with the best intentions, they are responsible for the full value of the property parted with.

The policy of the law requires, that the relation of trustee, and *cestui que trust*, should be guarded with vigilance, and contracts between them scrutinized, that no injustice should be done the *cestui que trust*.

Where a *cestui que trust* has undertaken to indemnify his trustee, a court of equity ought to be satisfied that he was free to act, as a rational, intelligent man, not governed by considerations growing out of a dependant condition; otherwise the indemnities will be disregarded.

Where a trustee disposes of the title to lands, in violation of his duty, and the court has no other possible means of reinstating the *cestui que trust*, the trustee is responsible for the utmost value of the property disposed of; yet when the value of the property can be clearly ascertained, that must be the measure of the indemnity.

In the case of a mixture or confusion of property from necessity, the full value is given to the innocent party.

A sale by one trustee to his co-trustee, is illegal.

Where it was the duty of trustees to collect purchase money, and invest it, some of the trust estate being sold to T, a co-trustee, and S, another trustee, made no effort, at any period during the existence of the trust, to oblige his co-trustee to pay for his purchase, but suffered it to lie in the hands of T, when he, S, knew, that the trust was abused, in consequence of a failure on T's part to apply the amount of the purchase money according to the trust, they are both responsible.

Where S and T sold personal property, with the assent of its owner, took bonds from the purchasers in their own names, collected a part of the purchase money, proffered themselves ready to account for such sales, made a return thereof as trustees, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which may be enforced in that court.

A court of equity must always decree upon the allegations in the bill of the complainant, and it is not justified in going beyond them. As where he relies upon trusts in certain deeds, and complains of a violation of those alone, though the facts admitted by the defendant disclose the existence of other trusts, for which they are responsible to the complainant; yet that court cannot decree for such other rights—they must be reserved for future consideration. In order, however, to do justice between the parties, where the trustees were bound to pay debts, the court will infer, in the absence of express proof, that the debts paid by them, after the receipt of money from the trusts not charged in the bill, were in fact paid out of such receipts.

Where one trustee purchases a part of the trust estate, for which he was to

pay at a stipulated period, and his co-trustee, under the circumstances, being jointly responsible with him for the principal, there is, of course, a joint responsibility for the interest.

Co-trustees are bound to know the receipts, and watch over the conduct of each other. Where one trustee received trust funds applicable to outstanding debts which he did not pay; nor did he keep such funds separated from the mass of his estate, a co-trustee, who from his situation must have known of such receipts, yet makes no effort to obtain them or have them applied, is jointly chargeable for interest with his associate.

Where trustees transcending their powers, make investments in unproductive property, they are chargeable with interest.

Where property is conveyed to trustees, to be sold for the payment of debts, and the surplus to be invested in stocks to produce interest, which interest is specifically appropriated by the terms of the conveyance; the proceeds of such estate being in hand, it was the imperative duty of the trustees, to have invested, unless a portion, or the whole, had been demanded by acknowledged debts; and where hopes were entertained by the trustees, that a claim, then depending in court, would be perpetually enjoined when it had been litigated for several years, and no reasonable expectation of a speedy close, they were not justified in laying by the money, and waiting the event of a protracted chancery suit. In such a case, the trustees were grossly negligent, and they must pay interest.

Compound interest will be allowed where a trustee is directed to invest funds, and to re-invest the dividends; or where the trust directs an accumulation, and the trustee has used the funds; yet the ground of this allowance is the actual or presumed gain of the trustee by the use of the funds. Where the circumstances forbid the presumption of gain by the trustee, it will not be allowed.

To trustees who have invested, or made efforts to invest, trust funds, a rest of six months on their receipts, without interest, will be allowed as a reasonable time within which to invest; but where they manifested no disposition to make such an application of their receipts, as the trust contemplated, no such rest is allowed.

It is a general rule, that an answer responsive to a bill, is evidence for the respondent; but the answer of a defendant, when it asserts a right affirmatively, in opposition to the plaintiff's demand, is not evidence.

An answer will not support a matter set up in avoidance, or discharge, where the matter of avoidance is a distinct fact; in such a case, the defence must be proved.

On a general bill to account, the answer is no evidence of disbursements; such a bill is nothing more than a demand on the defendant, to shew his receipts, and the legal sufficiency of his expenditures.

In all cases, where a complainant seeks a discovery and relief, and to make out his case, applies himself to the conscience of the defendant, if in his answer the liability is once admitted, there can be no escape from it, but by proof; though every thing which he says with regard to the creation of that liability, must be taken together.

By an equitable construction of, and by analogy to, the statutes of this state, allowing commissions to executors, guardians, and trustees, under judicial sales, commissions may be allowed to conventional trustees, though there was no agreement between the parties to that effect.

Where the chancellor's decree was entirely reformed in the appellate court, each party was decreed, in a case of cross appeals, to pay their own costs in that court.

The auditor's report may be excepted to in the appellate court, and the whole accounts gone into, whether general or special, or no exceptions had been taken to it in the court of chancery.

CROSS APPEALS from the Court of Chancery. In order that this case may be fully comprehended, we give the statements made of it by the Chancellor, and by the appellants' counsel, on the appeal by *S.* and *T. Ringgold.* The appellants' counsel stated that the original bill in this case was filed on the 29th of January 1811, by *Mary Ringgold*, wife of *Thomas Ringgold*, and the children of said *Thomas* and *Mary*, by *James Gittings* the elder, their next friend. It charges, 1st. That *Thomas Ringgold*, being seized of a considerable real and personal property in *Virginia* and *Maryland*, and being largely indebted, did on the 22d of October 1798, convey to *Samuel* and *Tench Ringgold*, the defendants, all his said real estate, in trust, to sell the same and pay his debts, and for other purposes. 2d. At the same time *Thomas* gave to his said trustees, authority to collect large sums of money due to him, and apply them in the same manner. They collected large sums, the amount thereof not ascertained, and they are required to render an account thereof. Shortly after the execution of said deed, and until the filing of the bill, *Thomas* and his wife have lived separately, and the wife and children have been supported by the father of the wife, *James Gittings.* 3d. The said *Thomas*, *Samuel* and *Tench*, seeing the justice of making provision for the wife and children of *Thomas*, which had been omitted in the first deed, and the wife being willing on these terms to relinquish her right of dower, a second deed to *Samuel* and *Tench* was executed on the 18th of December 1807, in which the wife relinquished her dower, and which conveyed to them all the real, and a large personal estate. In pursuance of said last deed, the trustees made sale, on or about the 2d of May 1808, of a large portion of the real and personal estate, and have received large sums of money, bonds, &c. A partial ac-

count thereof has been rendered to the complainants by *Samuel.* It is charged that there still remain unsold divers other tracts of land and personal estate. The complainants are informed that the trustees, or one of them, are or is largely indebted to *Thomas* for the proceeds of the estate of his brother *Benjamin,* which they contend ought to be set off against the sums paid by the trustees for *Thomas,* and pray that the amount of it may be set forth in the answer to the bill, and that it may be accounted for. It is charged that the trustees have not paid any part of the proceeds of sale to the complainants, nor have they invested it in any stock. Much of the money, with the bonds and notes, is in the hands of *Tench Ringgold,* who is out of the jurisdiction of the court. The bill then requires the defendants to answer the premises, and particularly what part of the property was sold, and for what price, and *that they render a particular account of their transactions under said deed of trust.* Whether they have not received large sums of money due to *Thomas Ringgold?* and if *yea, that they render* a particular account of each sum so received. Whether either of them was indebted to *Thomas; whether they have paid any of the debts due from said Thomas, and state the same?* If any yet due, to what amount, and to whom due? *Prayer,* that *Samuel* and *Tench* be compelled in all respects to execute the trust, and after paying the debts, to invest the balance for the benefit of the complainants. Also a prayer for general relief. The *complainants' exhibits.*—The deed of the 22d of October 1798 from *Thomas Ringgold* to *Samuel* and *Tench Ringgold,* of all his, *(Thomas')* houses, lands, lots and tenements, situate within *Maryland* and *Virginia,* in trust, to sell the same at public or private sale, for cash, or on credit, as they, or the survivor, may judge most expedient, and apply the proceeds to discharge the legacies directed in his father's will, to be paid by *Thomas.* 2d. To discharge all judgments at the time obtained against *Thomas,* with power to contest such as are not just. 3d. To secure and indemnify said trustees against all bonds entered into by them, or either of them, for *Thomas,* and all costs, fees to counsel, &c. incurred in virtue of this deed of trust. 4. To pay all other debts then due. 5. And as to the surplus, to permit *Thomas* to possess the real estate, and

receive the interest of the money, or have the same invested for his use, during his life, and after his death, his wife, if she survives him, to enjoy one third part of the real, and to receive one third of the interest of the money to her own use, and the rest to be applied to such persons as *Thomas* by his last will shall direct. If *Thomas* survive his wife, the whole of it to be applied as directed by his last will. To this deed there was no relinquishment of dower. Also the deed of the 18th of December 1807, from *Thomas* to *Samuel* and *Tench*, for all *Thomas's* land, in the counties of *Kent*, *Queen-Anne's* and *Baltimore*, wherever situate, in the state of *Maryland*, and all his negroes, stock, horses and plantation untensils, in trust, to sell immediately the whole, and *after paying all the just debts of said Thomas*, to invest the proceeds, *when received*, in bank stock, stock of the *U. S.* or turnpike stock. 2d. To pay to the wife of *Thomas*, during their joint lives, one-fifth part of the interest or dividends, as the same may be received, for her sole use. 3d. One-half of the residue of said dividends to the support and education of the children. 4th. All that remains to be paid to the grantor. 5th. If the wife of the grantor survive him, she is to receive one-third, and the rest to be applied to the support and education of the children. (Further provision in case the grantor survived his wife.) Finally, the whole capital to be transferred to such of the children as *Thomas* shall by will direct, or if no will, to go equally to the whole. To this deed there was the wife's relinquishment of dower. Also the partial account of the trustee, (*Exhibit* No. 3,) which it is stated in the bill was rendered by *Samuel* to the complainants. It purports to be an account of sales of land and negroes, stock and farming utensils, sold by *S.* and *T. Ringgold, without date.* The *answer* of *Samuel Ringgold*, filed the 12th of February 1814, admits the deeds; that the defendants accepted of the trust, and sold the property, with the exception of some parcels of land, which are described, and which he states they had been unable to sell. He exhibits accounts marked *S. R.* No. 1 to No. 4, which he states contain a full exposition of his conduct as trustee. *In these he has charged himself with all monies which came to his hands as a trustee, and gives himself credit for all pay-*

*ments made by him*, and that there was due to him on the 13th of March 1813, the sum of $13,084 77. In these accounts he has not charged himself with $25,000 mentioned in the account rendered to the complainants, (their *Exhibit* No. 3,) as the price of land sold to *R. S. Thomas*. The said land was sold to *R. S. Thomas* for certain lots at *Havre-de-Grace*, and certain ferry rights on the *Susquehanna*, estimated at $18,000; and, secured by mortgage, $7,000, amounting together to $25,000. The said sale was considered at the time highly beneficial to *Thomas Ringgold*, and the complainants. *Thomas Ringgold*, before the exchange took place, was consulted, and advised it, and has since approved of it, as will appear by *Exhibit* No. 5, with *Thomas Ringgold's* certificate thereto, of the 30th of March 1813. The property received in exchange as aforesaid from *R. S. Thomas* was conveyed in fee simple to the trustees. The defendant has always considered the same to be held in trust for *Thomas* and his family. Last summer (1813) the ferry-house, a large and valuable brick building, was destroyed by the *British*. Since, the defendants have sold said property for $14,000, for which they are accountable to the complainants. Although in the account rendered (complainants' *Exhibit* No. 3,) the farm called *Hopewell* was estimated at $20,178, it was in reality worth only $16,000. It was put up at that sum, and was struck off at that bid, at the time of the sale; but in the exchange with *R. S. Thomas* it was estimated at the first sum. The answer next states judgments obtained by *John James Maund* against *Thomas Ringgold*, for the removal of which to the court of appeals, the defendant became security in the appeal bonds. If these claims should be sustained, they will greatly increase the balance due from *Thomas Ringgold* to the defendant. It is stated that the claims were believed to be fraudulent, and a bill for relief had been filed in chancery. There are other claims, but of the precise amount the defendant is not informed. *Exhibit S. R.* No. 6, is a list of lands, negroes and specifics, sold by the trustees, and the previous *Exhibits*, *S. R.* 1, 2, 3, 4, will show what part of the purchase money has been received by him. As to *Benj. Ringgold's* estate, the negroes and horses were divided among the representatives before the execution of the deed of trust;

the balance of the personal estate not sufficient to pay the debts of the deceased. The real estate of said *Benjamin* consisted of land in *Queen-Anne's*, (the interest of *Thomas* in which is a part of his real estate, not sold,) and a tract of land in *Washington* county, which *Thomas* himself sold to the other defendant, *Tench*. The answer also sets forth a legacy of £500, left by their mother to the defendants, in trust for *Thomas* and his family, and for which *Thomas* is credited in statement No. 4. The *answer* of *Tench Ringgold*, filed the 15th of July 1816, exhibits accounts, which show the monies received and paid by him—gives the statement that is given by the other defendant relative to the exchange of lands with *R. S. Thomas*; and states sundry expenses incurred by him, in order to give value to the ferry property received in the exchange. He refers to *exhibit* F, for showing the balance due from him to be $14,811 15. On the 6th of October 1818, the complainants filed a supplemental bill, and set forth the proceedings in the former suit. They charge, that agreeably to the provisions of the deed of 1798, the wife, in the event of her surviving the husband, was entitled to a certain interest, and the rest of the complainants to the balance of the trust property, in the event of *Thomas Ringgold* dying intestate; and that the deed of 1807 invested complainants with an immediate and certain interest, in certain proportion, in one half of said trust estate, during the life of *Thomas Ringgold*, and after his death, with a contingent interest in the whole proceeds. The complainants next charge, that *Thomas Ringgold* on the 28th of March, 1816, conveyed all his interest in said property to his two sons, *Thomas* and *James*, in trust, to provide for his comfortable maintenance, and for the support and education of all his children—and divide the principal among them as they should arrive at full age, and with authority to the grantees to compel the trustees to execute the trust. They have lately been surprised to hear, that *Thomas Ringgold*, who is stated to have died in 1818, had left a will, which the complainants exhibit, leaving to his daughter *Elizabeth* £500, on her arriving at 18, or her marriage; $500 to *Silence Kinsley*, and the rest to be equally divided among all the children, including *Elizabeth*. The executors renounced,

and letters of administration have been granted to the widow. The complainants are advised, that *Thomas Ringgold*, after the said deeds, had nothing to dispose of after his death. These facts having happened since the filing of the original bill, in order to bring the rights of all parties before the court, and to have a full settlement of said trust, it is necessary for complainants to file this their supplemental bill, which they pray may be accepted as such. They have reason to believe, that the defendants have, since filing the original bill, sold more of the trust property, and have received the purchase money, and other monies, for property sold previously, "which sums of money are no ways accounted for in the answers of said trustees to the said bill, or the accounts and exhibits therewith filed." There were various articles of property received by said defendants under the deeds of trusts, and various sums of money received by them before the filing of the original bill, which are not noticed, or any ways accounted for, in their answers, and the accounts and exhibits therewith filed. They mention nine negroes taken by *Samuel* at $2000; a negro woman and her two sons, worth $800, taken by *Tench;* also considerable sums of money received by them for rents of land in *Kent* and *Queen-Anne's* counties before the filing of the bill, for which no account is rendered. They conceive that they are entitled to demand the $25,000 for lands sold to *Richard S. Thomas*, and have nothing to do with the property and ferries, and ferry rights, bought from *R. S. Thomas;* yet if mistaken in this they have a right to demand an account of the rents and profits thereof. They call upon the defendants to answer the premises, and fully and particularly account for all their acts and doings; pay over all the monies, and assign to them all the trust property. The will of *Thomas Ringgold*, exhibited by the complainants—In it is the following clause: "Whereas I am fully sensible that my brothers, *Samuel Ringgold* and *Tench Ringgold*, have always considered my interest, and have done every thing in their power to advance my welfare, and that of my family, I do hereby fully, completely, and in the most ample manner, ratify and confirm all purchases and sales of whatever nature or kind, of my property, made by my said brothers, or either

of them, or both of them." The will is dated the 6th of July 1811, and was proved on the 20th of May 1818. *S. Ringgold's* answer to the amended bill, was filed the 6th of October 1819. He admits the deed of *Thomas Ringgold* to his sons, and his will; that his widow was appointed administratrix; states some sales which have taken place of trust property; some of the money still due, the rest paid to the complainants. He denies that he had received any money not accounted for in his answer to the original bill. The negroes delivered to him at $2,000, were in part payment of a debt due to him from *Thomas Ringgold.* He accounted in his former answer for all rents and profits received by him. He leaves it to his co-trustee to render an account of the rents received by him, also of the negroes which he is charged to have received. The *answer* of *Tench Ringgold* to the supplemental bill, states that he has sold no property since filing his first answer. He denies the charge of having taken a negro woman and her children, the property of *Thomas Ringgold.* In answer to the charge of having received rents and profits of the ferry, he gives a particular account of the contract with *R. S. Thomas;* the approbation of it by the complainant *Mary*, as well as her husband; the situation of the ferry property; the expenses incurred by him in regard to it, &c. &c. An abstract of which, on account of its length, cannot here be given.

Commissions issued, and testimony taken thereunder; and by agreement of the parties, the auditor was directed to state the accounts. To the report and accounts of the auditor, both parties excepted upon various grounds. The case having been argued was submitted.

JOHNSON, Chancellor, (July Term, 1824.) On the 29th of January 1811, the original bill was filed, setting forth, that on the 22d of October 1798, *Thomas Ringgold,* the husband of *Mary,* and father of the other complainants, being largely indebted, executed a deed to the defendants for a large real and personal estate in *Maryland* and *Virginia,* in trust, to sell and pay his debts. *First.* The debts and legacies of his father's will. *Second.* All judgments at that time obtained, with the power of contesting such as were not considered fair. *Third.*

To indemnify the defendants as his sureties, and from all cost and fees to counsel, and expenses incurred under the deed. *Fourth.* To pay all other debts at that time due. *Fifth.* The surplus, consisting of real estate, bonds or money, in trust, to permit the grantor to hold and possess the real estate, and receive the interest of the money, or have it laid out and invested for his benefit, during life, to his own use and advantage; on his death, living the wife, she to have one-third of the real estate, and to receive the interest of one-third of the money during her life, in lieu of dower. *Sixth.* The other two-thirds to be conveyed and applied to such persons as *Thomas Ringgold*, by his will, shall direct. *Seventh.* If he survived his wife, then the whole to be conveyed and applied according to his will; and *Eighth.* If he died intestate, then to his heirs and representatives. To this deed Mrs. *Ringgold* was not a party, nor did she release her right of dower. The trustees, as the bill declares, were also authorised to receive the debts due to the grantor, and they did receive them to a large amount. Shortly after the deed, *Thomas Ringgold*, and wife, by mutual consent, agreed to live separate, and remained so when the bill was filed, and she, and the children, as is stated in the bill, lived with and were supported, and the children educated by her father, *James Gittings*. *Thomas*, *Samuel*, and *Tench Ringgold*, in order to make provision for the wife and children, and she, on the terms of such provision, agreeing to release her dower, another deed, on the 18th of December 1807, was executed, by which *Thomas* conveyed to *Samuel* and *Tench* all the lands and real estate of *Thomas*, lying in the counties of *Kent*, *Queen-Anne's* and *Baltimore*, wherever situated in *Maryland*, with all his negroes, stock, horses and plantation utensils, in trust, immediately to sell the whole at public or private sale for the best price, and after paying all debts, to invest the proceeds, when received, in bank stock, or in stock of the *United States*, or turnpike stock, as shall be most beneficial. *Second.* To pay to the wife, for her sole and separate use, during the joint lives of husband and wife, one-fifth of the interest or dividend yearly, or half yearly, as the same may be received. *Third.* To pay and apply one-half of the residue to the support and education of the children, yearly or half yearly. *Fourth.* To pay the whole

residue to *Thomas*; and in the event of the wife's surviving, then, *Fifth.* She is have one-third, in lieu of the one-fifth. *Sixth.* The other two-thirds to support and educate the children; and if *Thomas* survived, *Seventh.* Then one-fifth given to the wife to go to him. *Eighth.* Till the proceeds of the sale are invested, the interest to be paid and applied as received, in the same proportions and manner to the same persons. *Ninth.* To transfer and assign the whole capital, whether in stocks or debts, to such of their children as *Thomas* by will shall direct, subject to the previous trusts; and if he died intestate, then the whole capital to be equally divided amongst their children, subject to the previous trusts. This deed was signed by the wife, as well as by *Thomas*, *Samuel*, and *Tench Ringgold;* and she formally released her dower. In virtue of this deed, as the bill declares, the trustees, on or about the 2d of May 1808, sold a large portion of the real and personal estate, received divers sums of money, bonds, notes and mortgages, of which a partial account was rendered by *Samuel;* that there remained unsold other lands and personal property. That the trustees, or one of them, is largely indebted for the proceeds of the estate of *Benjamin Ringgold*, deceased, which the bill claims to be set off against what the trustees may have paid for *Thomas.* No part of the proceeds of sale have been invested, and the greater part of the money, bonds, and other securities, the bill declares, are in the hands of *Tench Ringgold*, residing in the District of *Columbia.* The amount of sales, according to the account rendered by *Samuel*, a copy of which, *Exhibit* No. 3, is filed with the bill, is $48,886 90. In this account, a tract of land called *Hopewell*, with certain other property specified, is stated to have been sold to *Richard S. Thomas* for $25,000. A memorandum appears at the foot of the account as follows, to wit: "The ferries at *Susquehanna* we have taken from Mr. *Thomas* at $18,000. The deed is given to *S.* and *T. Ringgold*, as they had no right under the deeds of trust to invest the monies in lands, and *S.* and *T. Ringgold* are answerable for that amount. They mean to sell them as soon as they can to advantage, which shall accrue for the benefit of *Thomas Ringgold*, Mrs. *Ringgold*, and the children." The original account, of which *Exhibit* No. 3 is a copy, distinguish-

ed by *Exhibit* B, is in the handwriting of *Samuel Ringgold*. *Samuel Ringgold*, in his answer filed on the 12th of February 1814, admits the trust deeds, and the sale of the real and personal estate for the purposes specified, except part of the real estate of *Benjamin Ringgold* in *Queen-Anne's*, and about 60 acres in *Kent* county, which they have not been able to sell. His accounts, exhibited with his answer, *S. R.* No. 1, to *S. R.* No. 4, contain a full statement of his conduct as trustee. In those statements he has charged himself with all monies that have come to his hands, and credited himself with payments and disbursements, and there was due to him on the 13th of March 1813, $13,084 77. In these statements the respondent says he has not charged himself with the sale of the property estimated in the account rendered by him to the complainants, of $25,000, for land sold to *R. S. Thomas*, for lots and land at *Havre-de-Grace*, with ferries and ferry rights on *Susquehanna* river, in which account *Hopewell* was valued at $18,000. Before the sale or exchange *Thomas Ringgold* was consulted, and he approved the measure, and it was deemed a beneficial transaction. *R. S. Thomas* conveyed to *S.* and *T. Ringgold*, and that he, *(Samuel,)* always considered himself a trustee for *Thomas Ringgold* and family. The last summer, the answer states, that the ferry-house, a large and valuable building, was destroyed by the *British*, and since then the trustees have sold the property for $14,000, for which they are accountable. And although in the account rendered by the respondent, *Hopewell* is estimated at $20,178, yet he alleges it was only worth $16,000, the sum it was put up for at the public sale, and struck off at the trustees' bid. In the negotiation with *R. S. Thomas* it was estimated at $20,178 by which the trustees made $4,178 for the complainants. That exclusive of the $13,084 due to the respondent, he has made himself answerable for a large sum on account of a judgment obtained by one *Maund*, use of *Ricketts* and *Newton*. Suits were brought on the appeal bonds, executed on the removal of the original judgment to the court of appeals, and judgments obtained, and if compelled to pay, the balance due him will be proportionably increased. The claim, *(Maund's)* was thought unjust, and therefore contested. The answer denies that the complainants have been

entirely maintained by Mr. *Gittings*, for the respondent paid two thousand dollars. *Samuel Ringgold* administered on *Benjamin Ringgold's* estate, and the negroes, and some other property, were divided between the representatives before the deed of trust, not leaving enough to pay the debts. The part of the real estate in *Washington* county of *Benjamin's*, that *Thomas* was entitled to, he sold to *Tench*. *Tench* in his answer states in substance, so far as relates to *Hopewell*, and the ferries, the same facts as in *Samuel's* answer. In the original answer of *Tench* no vouchers were filed; exceptions were taken, which were sustained; and on the 15th of July 1816, an amended answer was filed, accompanied with certain vouchers. *Thomas Ringgold* having died on the 6th of October 1818, a supplemental bill appears, setting forth, that on the 28th of March 1816, *Thomas Ringgold* transferred to his two sons *Thomas* and *James*, all his interest in the trust property, in trust, out of the interest and dividends, to provide for the father's comfortable maintenance, for the support and education of his two sons and their brothers and sisters, during their minority, and to divide the principal and interest equally between them, their brothers and sisters, as they respectively arrived at age, and authorised the grantees to compel a settlement with the defendants. *Thomas Ringgold*, on the 6th of July 1811, made a will, and after certain bequests devised the residue of his estate equally amongst his children—the executors renounced, when letters of administration were obtained by *Mary* his widow. Since the original bill, the supplemental bill charges, that the trustees have sold more of the trust property, and received more money, and in the answers to the original bill they did not account for all they had received, particularly nine negroes taken by *Samuel* at $2000, and that they have not accounted for rents received. In the supplemental bill it is alleged, that the deed of trust to the sons being subsequent to the will, revoked it. *Samuel*, in his answer to the last bill, denies that any of the trust funds were sold, except some lands in *Kent*, for which suits were depending to recover the purchase money; and except another small piece, the purchase money for which was received by *James G. Ringgold*, one of the complainants. Admits the delivery of

the negroes to him at $2000. On the 13th of July 1820, with the consent of the parties, an interlocutory decree was made, directing the auditor "to state an account upon the evidence already taken, and upon such other evidence as shall be produced before him by either of the parties. That the auditor shall state accounts according to the instructions of each of the parties, and that all equity, as to the rights of the parties, be reserved until final hearing." After taking, in virtue of the decree, a variety of evidence, and with the mutual admissions of the correctness of various items against the defendants, and of sundry disbursements in their favour, on the 6th July 1822, his report was made, containing several accounts in pursuance of the complainants' instructions—One of the defendant's, and a third in conformity with the auditor's own judgment. From the voluminous papers and documents, the variety of evidence, and the extensiveness of the transaction, much labour and attention are indispensable for a correct decision of this cause; but the well arranged view of the subject taken by the auditor in his report and accounts, greatly contributes to relieve the court. In making his report he has distinguished those disbursements which are admitted, from those not admitted, or disputed, or reserved for his further consideration. Those statements he has distinguished by Nos. 1 and 2. From the evidence and vouchers admitted, the defendants' receipts are stated before and to the time of the second deed of trust of the 18th of December 1807, distinguishing them by their respective sources, and classing them accordingly in separate statements marked A, B, C, and D. From those materials an account current between each of the trustees is stated to the date of the second deed, charging and crediting each with his own receipts, and admitted disbursements, and with interest, showing the balance then due to or from either The interest is charged from the end of six months after the date of the receipt. These accounts are numbered 1 and 2, From the evidence referred to, *statement E* is made to show the several sums which the trustees were chargeable for on account of sales of the trust estate, by them made about the close of the year 1807, and afterwards. This statement, as the auditor most correctly observes, makes an important part of every subsequent account; and in regard to

the sale of *Hopewell*, and the ferries, taken in exchange, is controverted by both parties.

In the *statement* E, the defendants are charged with the sum of $16,320, on account of the sale of *Hopewell*, when according to *exhibit* B, (the list of sales furnished by the trustees,) that tract is charged as having been sold for $20,178. The sale of this tract of land presents one of the important subjects of controversy. To present the subject matter of controversy in a clear light, the auditor has returned with his report several accounts predicated on different principles—the *account* No. 4 leaves a balance against the defendants of $46,963 92; this is the account formed according to the auditor's judgment. *Account* No. 5, grounded on the complainants' instructions, makes a balance in their favour of $74,463 23; and *account* No. 6, founded on the defendants' instructions, makes the balance only $21,900 39. Exceptions have been taken by the complainants and defendants, each excepting to all the accounts that are inconsistent with the accounts they claim as correct; in other words, the complainants insist on *account* No. 5, and the defendants on *account* No. 6. The case has been fully and elaborately argued, since then that attention has been bestowed on the cause which its magnitude and importance demanded.

The first subject of inquiry is to what extent are the defendants responsible on account of the sale or exchange of the tract of land called *Hopewell?*

Trustees, who faithfully and diligently discharge the duties they take on themselves to perform, can never sustain loss; they are only liable for what they duly receive in the performance of the trust; and acting *bona fide* within trust limits, should an injudicious sale of the trust funds be made, yet no responsibility attaches to them, they can only be called on to account for the amount actually received. But when the trustee transcends his limits, when the funds confided to his limited superintendance are applied to objects foreign from the trusts, then he becomes responsible for the utmost value of the funds thus misapplied. *Lupton vs. White*, 15 *Ves.* 432. *The Attorney General vs. Fullerton*, 2 *Ves. & Beam.* 265. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 108, 116.

The deeds, under which the trustees acted, cannot be considered as authorising them to exchange the land for other land. The object of the deeds was to raise money to meet pressing demands to discharge the debts *Thomas Ringgold* was responsible for, to indemnify his sureties, and to invest the surplus as prescribed for the benefit of the respective persons mentioned in the deed, and to the extent as herein provided. Of the limited powers conferred by the deeds, the trustees were perfectly aware, and therefore, in the account of sales rendered by *S. Ringgold*, he remarked, "The ferries at *Susquehanna* we have taken from Mr. *Thomas* at $18,000. The deed is given to *S.* and *T. Ringgold*, as they had no right, under the deeds of trust, to invest the monies in lands, and *S.* and *T. Ringgold* are answerable for that amount." If trustees, misapplying the trust funds, are responsible for the utmost value, and as the tract of land called *Hopewell* has been parted with by them to an object foreign from the trust, it would appear, that the only subject of inquiry, in regard to the extent of the trustee's responsibility on that account, is the value of the land.

When the tract was exposed to public sale, it appears by the evidence it was struck off at $16 per acre, the price it was set up at. That afterwards they agreed to sell it to *R. S. Thomas* for that price, which ultimately he refused, when the exchange was accomplished, in which *Hopewell* was estimated at $20,178. If a trustee diverts the funds, by applying them to objects foreign from the trust, the *cestui que trust* has a right, either to receive that which the trustees obtained, or to make the trustee answerable for the full value of that which he parted with. The *cestui que trusts* in the present cause, if competent to act, could have elected to take the ferries in lieu of *Hopewell*, but they were not bound to do so; and as they claim the real value of *Hopewell* in 1807, when it was exchanged, they are entitled to receive it. On the part of the defendants no evidence is produced, except, that when exposed at public sale, it was struck off at $16 an acre, and that *R. S. Thomas*, after agreeing to give that price, refused to comply. Three witnesses are produced on the complainants' side, viz. *G. W. Thomas*, *William Barroll* and *Thomas Worrell*, all of whom concur, that the land exchanged was worth $25,000; they do not designate

the value of each part, but in the aggregate fix the value to be that which the trustees had placed on it in making the exchange. *Wm. Pearce* makes *Hopewell* to be worth $20 an acre, which is $222 more than it was valued at.

I am not apprised of any case being determined on which the value of funds, misapplied by trustees, have been come at by fixing on the amount they offered them at; the establishing such a principle might be productive of the most serious consequences, and prove highly detrimental to the interest of the *cestui que trusts;* but if in any instance it might be resorted to, surely not where the trustees had fixed *subsequently* on an enhanced value, and when that was, by disinterested witnesses, confirmed as the real value. The defendants are therefore to be charged with *Hopewell,* at the price attached to it at the time of the exchange. The trust in this cause was undertaken from the best of motives, attended with great expense, and considerable inconvenience to the trustees; they must sustain a loss; the unfortunate result of the exchange; the consequent destruction of the property on the ferry establishments, all fall on them, although the trusts reposed did not justify the ruinous transactions, all flowing from that exchange. Yet I feel fully assured the trustees acted from, and were governed by, the purest of motives, to wit, to extricate their brother, and provide for his family. And although principles, too powerful to be resisted, call on the court to cast those losses on them, yet so far as the just power of the court extends, they should be protected.

In the statement of the accounts by the auditor, he has allowed to the trustees a commission. It is true the *British* authorities refused to trustees commissions *eo nomine,* and yet they allow a compensation for the time employed in the performance of the trust, under the appellation of a *per diem.* But in this state the *per diem* has, if it ever existed, long since been abandoned, and the compensation is made by way of commission. To the *cestui que trust* the name of the compensation is of no moment; and to permit a *per diem* to be the governing rule, would be for the trustees to fix on the amount of the compensation, or the court must reject that part of the report stating the time they were engaged, and resort to some other standard, difficult to be fixed on. The defendants are

therefore to be allowed the commissions according to the principles of the report.

The auditor has given credit to the defendants for several sums alleged to be paid by them, in the performance of the trust, to support which no other voucher exists except the accounts rendered by the defendants in their answers to the original and supplemental bills. In the case of *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 87, the law on this subject came under the consideration of Chancellor *Kent*. There are all the items in the account of *Van Rensselaer* (one of the defendants,) unsupported by evidence, and resting alone on the answer, were not correctly rejected. The bill was against him, and others, for an account as administrators, and charging them with various acts of fraud. *Van Rensselaer* in his answer, sets up certain claims against the testator himself, and those were attempted to be supported by his answer alone. After examining the claims specified in the account, and remarking on each, the chancellor reviews the law generally, and comes to the conclusion—"That those charges in the account, which are without proof, are inadmissible, and cannot be upheld by the answer, is a proposition which I consider to be as settled in law as it is in reason."

In the course of the discussion, a distinction is taken between reading an answer either at law or in chancery, when it is introduced as evidence, and the effect of the answer, in the very case under consideration, and before the court for its decision, when that answer was put in issue. In the first it seems conceded, if part of the answer is read, the other party has a right to read the whole as evidence—not so when the answer is put in issue. It seems to me, that the law is most clearly established, that when the defendant in chancery admits a charge against him, and desires to remove it by the statement of a distinct fact, by way of avoidance, and the answer is put in issue, the proof of the matter of avoidance is on him. But the nature, or the precise meaning, of the word avoidance, does not so clearly appear. And all the cases which have presented themselves to my view, are of the representatives of deceased persons, as executors or administrators, when called on to account, setting up claims against the deceased, not for expenses incurred in the performance of their trusts.

The case before Lord Chancellor *Cowper*, as reported in *Gilbert's Law of Evidence*, 45, was a bill by creditors against an executor for an account of the personal estate. The executor stated in his answer, that the testator left £1,100 in his hands. Afterwards, on a settlement with the testator, he the executor gave his bond for £1,000; and the other hundred pounds was given by the testator for his care and trouble. It was urged, in behalf of the executor, that having charged himself, and no testimony appearing, he ought to find credit where he swore in his own discharge. But it was resolved by the court, that when an answer was put in issue, what was confessed and admitted by it need not be proved, but that the defendant must make out, by proof, what was insisted on by way of avoidance. There is an obscurity in the report of this case. As no one can be heir to a living person, so no man alive can have an executor, (unless in old times, when he might be *civiliter mortuus*;) and therefore, a testator could never give to his executor £100 out of $1100 he had left with him, and take his bond for the balance.

If the defendant in his answer admits the receipt of money, but in the same sentence says he paid it away, the disbursement claimed needs no other proof; but if in one sentence the receipt is admitted, and in another the payment alleged, it must be proved otherwise than by the answer. *Kirkpatrick vs. Love*, *Amb.* 589. *Blount vs. Burrow*, 4 *Bro. Ch. Rep.* 74. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 87, &c. And these rules are said to be similar to those which govern in a court of law. But I am not aware that such principles prevail at law. It is very true, that when proof is obtained at law, that the defendant at one time admitted he received money from or of the plaintiff, he shall not free himself from the effect of that admission, by declaring at a different time he restored it to him, or applied it for his use. A court takes the whole conversations or declarations made at the same time, and does not limit its effect to this or that sentence. If at law the plaintiff uses as evidence the defendant's account to charge him, he is entitled to read the residue to discharge him, and is not confined to such as may be connected with the same sentence. The same, if the letters of the defendant are read in part by the plaintiff to charge, the

residue may be resorted to, to exonerate from the claim; and notwithstanding the high names maintaining the justice of the rule, that what is admitted in the answer, cannot be defeated by the answer when put in issue, I must confess the justice of the rule is not so clear to my mind. But the rule is not only said to be just, but a contrary doctrine would be pernicious, and render it absolutely dangerous to employ the jurisdiction of this court, inasmuch as it would enable a defendant to defeat the plaintiff's just demands by the testimony of his own oath, setting up a discharge or matter in avoidance. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 90. It appears to me more just, that if the complainant relies on the defendant's answer to maintain his claim, that he should take that answer entire; that the whole, as it would at law, should be before the court, with the powers of believing such parts, and no more than was believed to be true. The rule is too technical for a court of equity, which excludes the defendant from the beneficial parts of his answer, while his adversary is suffered to avail himself of those parts in his favour. A court of equity forces a defendant to disclose the whole transactions, and in the instances of executors and trustees, forces them to render an account, not only of their receipts, but disbursements; and it would seem but just, that at least the attention of the court should be called to those statements made in compliance with its mandate, and not to have its eyes closed, and its understanding arrested, by being told the answer is at issue, and therefore the complainant may seize on admissions in his favour, and exclude the defendant from simultaneous statements; for let it be remembered, the whole answer is presented to the court at the same time.

The case now before me is not perfectly similar to those referred to in the opinion of Chancellor *Kent*. Here, the defendants for many years acting as trustees in the settlement of a complicated estate, were authorised to pay debts, provide for the support of the *cestui que trusts*, and having entered on the trusts, after a considerable time are called on for a settlement. No imputation or charge of fraud is made against them; they are called to render a particular account of their transactions by the original bill, and by the supplemental bill; that they fully

and particularly account for all their acts and doings. The accounts and the correctness of them to a very great extent, at least, by the admissions of the complainants, are just. If it would be absolutely dangerous to employ the jurisdiction of the court, inasmuch as it would enable a defendant to defeat the plaintiff's just demands by the testimony of his own oath, setting up a discharge or matter of avoidance, may not the same be said on the other side, that it is absolutely dangerous to a defendant to call upon him for an account of his transactions as trustee, then to sift from his answer every thing to charge him, and turn him over to seek for proof of his own disbursements, great part of which cannot be obtained, owing to the confidence between him and the *cestui que trusts*. But the dangers on the part of the plaintiff and of the defendant are removed, by permitting the whole answer, if any part is relied on, to go before the court, with liberty to reject such parts as are not believed to be true. And believing, from the whole of the transactions, that all the disbursements allowed by the auditor, except that relating to *Hopewell*, are true, they are allowed, and the exceptions of the complainants on that subject overruled.

On the subject of interest I shall not attempt to review the numerous authorities produced at the argument, but content myself by observing the interest has been charged in conformity with the usual practice in this state. When trustees are directed to invest money, and fail to do it, they are liable to be charged with compound interest, unless some sufficient reason exists to free them. But that applies to cases of plain trusts, where the duty is obvious, and the means of performance clearly *within* their reach. In this case, from the whole of the evidence, it is difficult to fix on any period that the trustees had money in hand to be invested. The receipts by them, and the expenditures, are so blended together that the rule usually adopted in the interchange of dealings between merchants of interest accounts, appears the most judicious, and the allowance of the six months to pay away or invest before the trustees should be charged with interest, appears not unjust. The interest, therefore, allowed by the auditor to them, as well as that with which they are charged, is allowed.

It is difficult in this cause to divide the mutual responsibility of the defendants to the complainants; the funds confided to them have in part been so blended with their own affair; and the defendant, *Samuel*, having permitted *Tench* to receive so large a part of the money, when the former was in advance. By the *cestui que trust* the confidence was reposed in both of the trustees, one had no right to suffer the funds to remain unemployed in the hands of the other, especially when he had left the state, and was beyond the jurisdiction of the court. The acceptance of the trust, to use the language of Chancellor *Hardwicke*, obliged them to execute it with fidelity and reasonable diligence. 2 *Atk.* 406. And although I am perfectly satisfied it never was the intention of either of the trustees to conduct themselves so as to produce loss to the *cestui que trusts*, yet by dividing the responsibility, and making each only liable for what he received, I apprehend would cast a heavy loss on them. My opinion is, that each is liable to the complainants for the whole sum due them.

In respect to *Thomas Ringgold's* sanctioning accounts, and to his approval of the exchange of *Hopewell*, it can have no effect; after the deeds of trust were executed, he alone could not control or direct their objects. In regard to the accounts, I am perfectly assured he did not know whether they were just or not; but when his condition is taken into view, united with the cautious manner the court views the transactions between the trustee and the *cestui que trusts*, it appears to me that no tribunal ought to say that his confirmation of those accounts should free the defendant, *Samuel Ringgold*, from accounting in this court. In order, therefore, that the opinion expressed should be carried into effect, the auditor is directed to state an account pursuant thereto. The accounts, when stated, not to be subject to exception.

The auditor, in conformity to the above decretal order, stated an additional account, making a balance due from the defendants to the complainants, of $53,857 79, with interest on $39,480 46, part thereof, from the 1st of July 1822, until paid.

BLAND, Chancellor, (December term 1824.) The chancellor having considered the decretal order pronounced in this

cause on the twenty-sixth day of July, in the year eighteen hundred and twenty-four, as well as the report of the auditor of this court of the account between the parties, which has been stated conformably to said order, and exhibited in this court on the twenty-seventh day of September in the year aforesaid—*Decreed*, That the report of the auditor be confirmed, and that the defendants, *Samuel Ringgold* and *Tench Ringgold* shall, on or before the first day of December next, pay to the complainants, or bring into this court to be paid to them, the sum of fifty-three thousand eight hundred and fifty-seven dollars and seventy-nine cents, together with interest on thirty-nine thousand four hundred and eighty dollars and forty-six cents, part of the first mentioned sum, from the first day of July, in the year eighteen hundred and twenty-two, and the costs incurred by the said complainants in this court.

From which decree both parties appealed to this court.

The cross appeals were argued separately, before BUCHANAN, Ch J. and EARLE, ARCHER and DORSEY, J. but as the court in their decree consolidated the cases, one report only will be made, embracing the points argued in both.

In the argument of the two appeals the *four* first points were raised by the appellants' counsel, on the *first* appeal, as to the law arising thereon, and the remaining points by the appellants' counsel on the *second*. We number them in succession for the purposes of this report.

1. The appellants *(S. and T R.)* ought not to be charged on account of the *Hopewell* estate with more than they received for the same; or if so charged, they are entitled to the full benefit of the bond of indemnity.

2. *Samuel Ringgold* is not responsible for the trust fund which came to the hands of *Tench Ringgold*, his co-trustee.

3. The charges of interest against *S.* and *T. Ringgold* are objected to.

4. The trustees were entitled to more commission than was allowed to them by the decree of the Chancellor.

5. The answers of the defendants are not *per se*, any evidence for them; but they are bound to sustain all their disbursements (except those which come under the head *de mini-*

*mis,)* by proof, as much so as the complainants are bound to offer proof of the amount of trust property which came into their hands.

6. *Interest* is to be charged on all receipts from their *dates*, as the trustees never invested, and never *intended* to invest. If a rest of *six months* be allowed, they are then chargeable with *compound* interest, or interest on the *annual balance* of *principal and interest.*

7. No provision having been made for allowing to the trustees any compensation or reward for their trouble, this court is not competent to make any such allowance.

8. *Tench Ringgold* is not a competent witness on behalf of *Samuel*, his co-trustee, as he swears directly to relieve himself from responsibility in regard to the *M'Mechen* transaction, &c.

*Wirt*, (Attorney General of *U. S.) Jones*, *Taney* and *Magruder*, for the appellants in the *first* appeal, on the *first*, *second*, *third* and *fourth* points.

1. On the *first* point—As to the charge on account of the *Hopewell* estate. The sale of it as expressly proved, was made before the deed of November 1807. It was authorised by the deed of 1798, which gave to the trustees the only authority they possessed at the time of the sale to *R. S. Thomas.* The deed of 1798, it must be admitted, did not authorise the trustees to take other land in part payment of the purchase money. On the other hand, it cannot be denied that the contract, if it had been authorised by the deed of trust, would have been a judicious one, and beneficial to *T. Ringgold's* estate. In examining this question we must inquire what was the value of each tract at the time of the contract, and before the ferry property was destroyed by the *British.* The latter was then of great value and every day becoming more valuable, owing to the increase of travelling between the east and south. At the time of the sale it rented for $2,000 *per annum.* What was the value of the *Hopewell* estate? It never rented for more than $1,000 with all the negroes and stock and utensils upon it. With these facts, some estimate may be formed of the *Hopewell* landed estate; and when, moreover, it appeared that the tenants who gave that rent did not find it a good bargain. The deed of trust authorised a sale of the

*Hopewell* farm, and one of the purposes for which that deed was executed (the payment of judgments to a large amount against *T. Ringgold)* imperiously required that funds be raised though by a forced sale. The land was advertised to be sold at public sale—general notice was given—a numerous assemblage of people drawn to it, and among them all, those in the county, who, according to the proof, were likely to be disposed or able to buy. The sale failed—nobody offered even $16 per acre. Afterwards, however, *R. S. Thomas* agreed to give for it that price, and the contract was made with the entire consent of *T. Ringgold*, who was present, and without opposition from any quarter. The land being now, as was rightfully supposed, disposed of, it became necessary to make disposition of the negroes, stock, &c. on the farm, as their master *T. Ringgold* could no longer employ them. With his consent (without it they could not have been disposed of, as the deed of 1798 did not convey personal property, and the deed of 1807 was not yet executed, if thought of) all the slaves, &c. were disposed of. It must be borne in mind that according to the proof, in order to rent the farm well, it was necessary for the owner to supply the slaves and stock which it required. After all the personal property had been disposed of, *R. S. Thomas* refused to take the land. What then was the situation of the trust property? Judgments to a vast amount, and each of them a lien upon the property. The judgments of *Maund*, which are of so much importance in this cause, bound the land; and although an injunction had been obtained, yet that injunction might at any time have been dissolved, and the trustees, being securities in the appeal bond, would be bound to pay the money. It is in this, most embarrassing state of things, that the trustees are called upon to listen to the second proposition of *R. S. Thomas*. And what is that proposition made by a man who had been importuned to take, and refused to take this land at $16 per acre? To agree to take the land valued at $25,000, provided only that the trustees would take in part payment the ferry property, to be valued at $18,000, and he to secure the payment of $7,000, the balance of the purchase money, and *the interest of which is almost equal to the rent of the Hopewell farm*, after de-

ducting from the highest sum for which it ever did rent, only legal interest upon the proceeds of the sale of the personal estate, which the tenant took with the land. The trustees are called upon to accept of, or refuse the offer. They do not act hastily. *T. Ringgold*, the only person, except the creditors, who had a right to object, approves of it, and has again and again sanctioned it. One of the defendants in his answer states, that *T. Ringgold's* wife, whose consent was not at all necessary, also approved of it. The sale, and the terms of sale, were sanctioned by the man who had a right to object; and never objected to by any human being, until the filing of what is called the supplemental bill in this cause; *and not* disaffirmed in that, even if the complainants had any right to object to it. Reliance may be had on the partial account exhibited by the complainants, and which they say was rendered to them by *S. Ringgold.* This *partial* account is a particular account of all the property which came to the hands of the defendants, in which any part of the family of *T. Ringgold* had any interest. It includes not merely the property which was conveyed to them by the deed of 1807, and in which the complainants, at the time of the filing their bill, had any interest, but also the property disposed of by them under the deed of 1798, in which the complainants, in the character in which they originally sued, had no interest. It contains also the legacy of Mrs. *Mary Ringgold*, of a debt due to her from *S. Ringgold*, a debt due from *Tench Ringgold*, and *also the personal property on the Huntingfield estate*, which she left to the defendants, in trust for such of the children of *T. Ringgold* as they might select, and with the express condition that no part of it should be answerable for his debts. And yet it is contended, that this very property, thus bequeathed by Mrs. *Ringgold*, ought to be considered a part of the trust property held under the deeds; and ought to be considered a part of the funds for the payment of *T. Ringgold's* debts—that these trustees ought to violate the trust created by Mrs. *Ringgold* for the benefit of the complainants. But *S. Ringgold* offered to take the ferry property at its valuation, if the family of *T. Ringgold* objected to the arrangement. In the first place *S. Ringgold* could make no offer by which the co-trustee could be bound. But if he could, when did *T. Ring-*

*gold*, or any member of his family, object to the contract with *R. S. Thomas*, or allow them to treat the ferry property as their own? Subsequent events, not to be foreseen in 1807—the war with *Great Britain*, the famous exploit of Admiral *Cockburn*, and destruction of the houses at the ferry, greatly lessened the value of this property, and might have furnished a *cestui que trust*, with a reason for disaffirming this contract. But it would then have been too late, even if then, which is not the fact, any person had immediately objected to the contract. We need not, however, rest upon the circumstance, that the offer of *S. Ringgold* was conditional. What if there was uncontradicted proof, that both of the defendants intended, at the time the contract was made with *R. S. Thomas*, to take the deed for this property to themselves, and to hold it as their own? By the terms of the contract it was to be paid for with *trust funds*. The consideration of it was a part of the proceeds of sale of the *Hopewell* farm; and although the defendants had determined to make this a part of their own private estate, and to charge themselves with the whole sum for which *Hopewell* sold, yet equity says, that even in that case it shall rest with the *cestui que trust*, whether it shall be the private property of the trustees, or a part of the trust estate. And *T. Ringgold*, the *cestui que trust*, has always claimed it to be a part of the trust fund, and insisted that the trustees should not charge themselves with the price at which *Hopewell* sold, and take to themselves this property. This, it is in proof, he had decided to do, before the deed of 1807. No matter then what was the intention of the trustees; it depended not upon their intention, but upon the sovereign will of the *cestui que trust*, if declared within a reasonable time, whether this should be the private property of the trustees, or a part of the trust fund; and it being in proof, that *T. Ringgold* immediately (before the complainants had any interest in the estate,) at the very time the contract was made, claimed it, and said it should be considered as part of the trust estate, the trustees could not claim it, but held it in trust; and so holding it, it passed by the deed of 1807, which was but a new declaration of trusts, and which alone could give the complainants originally, a standing in the court of chancery. Assuming then that the deed of 1798

did not authorise the contract with *R. S. Thomas*, it is contended, that it is now too late to impeach it. It is no breach of trust, if the trustee acts with the *cestui que trust*, or he acquiesces. 2 *Com. Dig.* tit. *Chancery*, (4 W. 32,) 722. *Langford vs. Gascoyne*, 11 *Ves.* 333, 335. *Parkes vs. White*, *Ib.* 225. *Newl. on Cont.* 467. *Trafford vs. Boehm*, 3 *Atk.* 444. *Brice vs. Stokes*, 11 *Ves.* 324. *Fellows vs. Mitchell & Owen*, 1 *P. Wms.* 81. It cannot be impeached in this suit, because *R. S. Thomas* is no party. He had notice of the trust, and the deed to him referred to the deeds which gave the trustees the right to sell. If a purchaser has knowledge of the trust deed under which he purchases, he becomes himself a trustee. *Murray vs. Ballou*, 1 *Johns. Ch. Rep.* 575. *Selby vs. Alston*, 3 *Ves.* 341. 2 *Fonbl.* 153, 154, 155. 2 *Madd. Chan.* 103. 1 *Madd. Chan.* 364, 365. The complainants, if they choose, have a right to disaffirm the contract with *R. S. Thomas*, and claim the property sold to him. They may perhaps, ask that the sale be set aside; but they cannot claim a right to sell to the trustees, who never agreed to buy, and to make them pay an extravagant price for the land.

Again—If these points be in favour of the complainants, yet *T. Ringgold* gave to the defendants a bond of indemnity. He, the *cestui que trust*, claimed the ferry property, purchased, as must be admitted, with trust funds, and that the trustees might not be prejudiced, gave them a bond to save them harmless against all loss. If they are to be charged, then, with any loss sustained by them in consequence of this contract with *R. S. Thomas*, they have a right to resort to a part of the fund in the court of chancery for their indemnity.

To understand this case it is only necessary to observe, that from the record it appears that in the year 1798 *T. Ringgold* was entitled to a large real and personal estate, and at the same time was indebted to a considerable amount. He is induced to execute a deed of trust, and thereby subjected to the trusts therein mentioned, not all of his property, but his real property, reserving still to himself, absolutely and exclusively, the *jus disponendi* of the whole of his personal estate—negroes, debts, money, stock, and every thing but his land. The trusts declared in the deed are simply to pay all debts, of whatever

description, then due; and *secondly*, the residue to be at his absolute disposal. His wife is mentioned in it, but she is mentioned in order to secure to her, in the event of her surviving her husband, precisely what the law gives to her, without the consent of her husband. It is under this deed the sale of *Hopewell* was made, and of course no person, who could not claim to be a *cestui que trust*, had a right to impeach that sale. In 1807 a second deed was executed; and in this deed, for the first time, provision is made for the wife and children. This deed too conveyed, in addition to the land not already disposed of, all "his negroes, stock, horses, and plantation utensils," still reserving to himself the privilege of disposing, when and to whom he pleased, of all his money, bank and road stock, and all debts then due to him. The personal property at *Hopewell* had been previously sold, and the amount of sales constituted a portion of the debts due to him. The $7,000 due from *R. S. Thomas* did not pass by the deed of 1807, and has not been claimed by the creditors under that deed. Over all this fund, and especially the proceeds of sale of the personal estate at *Hopewell*, *T. Ringgold* had an absolute control, and this alone is an ample fund for the indemnity of the trustees. If then the trustees are to sustain any loss in the settlement of the account for the sale of the *Hopewell* estate, upon what principle of law or equity are they to be deprived of the indemnity thus secured to them? Not because there is no fund, to which they can resort, because here is a fund, of which the owner retained an entire disposal, and quite sufficient for their reimbursement. Not, surely, because this fund ought to be applied to the payment of the debts, as such a doctrine is a glaring outrage upon every principle of right. It would be to strip a man of his property against his will. He provides by deed for the payment of his debts, and for the support of his family. He is to judge what property shall be conveyed by that deed; and for any such purposes he does not choose to transfer money, bank stock, or debts due to him. Could the court of chancery alter his deed, and subject to any of the trusts property which it was not his pleasure to subject to any of them? For the benefit of his creditors, and of his family, he places his lands, his negroes, &c. beyond his control. They are made by the

man, who alone has authority to dispose of them, to be the sole fund—1st. For the payment of debts; and 2d. To provide for the support of himself and family. Of all the rest of his property, (if that conveyed by the deed of trust be sufficient to pay debts, even although the residue afforded a miserable support for his family,) he has a right, so courts of law and equity must say, to dispose as he pleases. To appropriate this property not included in the deeds of trusts, (and the disposition of which the grantor reserved exclusively to himself,) to any of the purposes of the trust deed, would be a downright violation of the right of property—the exercise of a power by the court of chancery which no department of government can possess in a free country. He had a right to give away this property, and so far as he yet retained the ability, he had a right, not only to sanction the sale made by his trustees, but to oblige himself to indemnify them from any damage which they sustained by reason of a disaffirmance of their sales, by creditors, or others, if others there were to impeach their conduct.

To deprive the defendants of the indemnity on which they rely, it cannot be said that *T. Ringgold* is to be treated as a person *non compos*, or from circumstances incapable of acting freely. It would be a violation, not merely of established law, but of common justice, that such charges should be listened to in argument, when all mention of them is studiously avoided in pleading. No one act of *T. Ringgold* is complained of—no settlement is impeached—no contract, into which he ever entered, is attempted to be set aside. So far from this, the complainants claim under his deeds as valid. They insist that he could dispose of his property. They insist moreover on the deed of 1812, which gave to them their standing in the court of chancery. If any such charge had been properly made, the record affords the most ample refutation of it. As to the acquiescence &c. of *T. Ringgold*, they cited *Brice vs. Stokes*, 11 *Ves.* 319. *Langford vs. Gascoyne*, *Ib.* 336. *Trafford vs. Boehm*, 3 *Atk.* 444. As to his competency, &c. they cited *White vs. Wilson*, 13 *Ves.* 88, 89. *Attorney General vs. Parnther*, 3 *Bro. Ch. Rep.* 442.

They insisted that it must be either fraud or supine, and very supine negligence, that induces a court of equity to deal

rigorously with a trustee. *Caffrey vs. Darby*, 6 *Ves.* 495. *Bovey vs. Smith*, 1 *Vern.* 144. Where a trustee conducts himself to the best of his judgment, the court will deal with lenity towards him. *Belchier vs. Parsons*, *Ambl.* 219. *Powell vs. Evans*, 5 *Ves.* 843. *Trafford vs. Boehm*, 3 *Atk.* 444. If the trustees had the right to take the ferries in exchange for *Hopewell*, then the admission of *S. Ringgold* was a mistake on his part and is not binding on him. *Lansdown vs. Lansdown*, *Mos.* 364. *Lammot vs. Bowly*, 6 *Harr. & Johns.* 500.

2. On the *second point*. In 2 *Fonbl.* 184, the general rule is laid down as to the liability of one trustee for the receipts of the other. He who wishes to get rid of a general rule must show the exceptions to it. The chancellor in his decree says that *Samuel* is to be charged, because he suffered *Tench* to misapply the trust fund. This was not the business of *Samuel*. He had no right to call upon *Tench*, nor *Tench* upon him. Trustees have all equal power and authority. 2 *Fonbl.* 184. The deed of 1798 was to secure a debt due to *Tench*, and to indemnify him for becoming one of the sureties of *Thomas*. How then could *Samuel* call upon *Tench?* An equal trust was reposed in both; and neither could control the other. If *Tench* abused the trust the *cestui que trust* might have applied to the court of chancery for his dismissal. The deed of trust executed by *Tench* to *Samuel* is to secure the latter against loss. If the complainants have any claim against *Tench*, they may resort to that deed; but they have no right because of that deed to call on *Samuel* in this suit. On this point they referred also to *Brice vs. Stokes*, 11 *Ves.* 319. *Hovey vs. Blakeman*, 4 *Ves.* 606. *Bacon vs. Bacon*, 5 *Ves.* 331. *Chambers vs. Minchin*, 7 *Ves.* 199.

3. On the *third* point. The case relied upon by the auditor, of *Dunscomb vs. Dunscomb*, 1 *Johns. Rep.* 508, to justify the charge of interest on all monies received after six months, is not in point. There nothing was to be done but to invest. In this case, before the trustees were authorised to invest one cent, they were bound to ascertain and pay all just debts, and contest those which were deemed unjust. It is in proof that there were debts of this description. *Maund* had recovered two judgments in the general court, one at May term 1798, and the

other at May term 1799, each for £1250, with interest from the 26th of July 1796, and costs. This claim was to be resisted, and was resisted in equity by *T. Ringgold.* It related to a sale made by *Maund* to *T. Ringgold,* of a parcel of land in a distant part of *Virginia.* The proof of the alleged fraud was to be obtained therein. Persons were to be discovered who would consent to act as commissioners to take testimony. Surveys were necessary, and to be made when it suited the convenience of surveyors to undertake them. Pending the suit in the court of chancery, the war with *England* broke out. *Maund* died, and new parties were to be made; and owing to these and other difficulties in the way of a decision, a final decree was not passed until March term 1818. We may well suppose that the defendant in that case was urgent for a decision, and would admit of no unreasonable delay. If it be charged that the complainant procrastinated it, or the trustees, it is apprehended that the record would show to the contrary, if it were necessary. It is not necessary, because no such charge is made in the bill; and the trustees are not chargeable with any breach of trust not charged in the bill. *Smith vs. Smith,* 4 *Johns. Ch. Rep.* 281. After the decree of the court of chancery the defendant appealed, and the decree of this court, affirming the decree, was passed at June term 1821. We think that while this case was pending the trustees were not authorised to invest any of the monies in their hands. We do not mean by this to say, that a disputed claim of a few hundred dollars would have justified the trustees in refusing to invest many thousands, or that this suit gave them a right to retain in their hands more than was sufficient to pay the debt, interest, costs, and all reasonable expenses. It cannot be contended that the trustees were bound to know what would be the fate of the suit against *Maund.* They were utter strangers to the contract, and the subject matter of it. They could not tell what would appear in proof. They could only know with certainty that judgments for large sums of money had been obtained at law against *T. Ringgold*; that these judgments were a lien upon the whole of the real estate which had been conveyed to them in trust, which they had sold, and for which they had received the purchase money.

That while the case was pending in chancery, the injunction might at any time be dissolved; and unless the money be immediately paid, the creditor could issue out his executions, and levy them upon the property sold, as well as the property of the securities in the appeal bonds. The issue of the suit in chancery being doubtful, the period of its decision equally so, whence the right of these trustees to make any investment of the funds, which by the express terms of the deed of trust were to be applied in the first place, and before any investment, to the payment of the debts then due, and of course *Maund's*, unless chancery would grant a perpetual injunction? Will it be said that the court of chancery could have authorised it? Can any man, by executing a deed of trust, though for the benefit of creditors, destroy a lien which an individual creditor had upon his property, and oblige him to acquiesce in the sale of that property, and wait for his money until the trustee can sell out stock, which he has purchased? Suppose in this individual case that the money had been invested, whether by or without the authority of the chancellor, and that the injunction being dissolved, the creditor had proceeded to levy upon the land; would the chancellor have granted another injunction to stay the sale until the money invested could be converted into money? If the trustees were bound or at liberty to invest, then they were to invest according to the deed, which authorised an investment in road stock, stock of the City Bank of *Baltimore*, or other bank stock; and what might have been the value of such investment we can easily ascertain. It was their duty, so it is argued, to invest; and if so, as they were authorised, they possibly might have invested in some of these funds which have so much depreciated in value. And if they had so invested, even by the mere express authority of the chancellor, and a decree had afterwards been pronounced in favour of *Maund*, will any man say they could have excused themselves for the loss of the funds, by alleging that they had invested the funds in stock now worth little or nothing, and therefore must be excused from the payment of the claims? Would they not have been charged with a breach of trust in investing without any authority to be found in the deed, funds which belonged to a credi-

tor? Who will affirm that the court of chancery, even after expressly authorising the investment, could have shown any mercy to the trustees? A trustee may be compelled to pay interest—in some cases compound interest. But in what cases? Where the trustee makes profits, and will not render an account of them. *Evertson vs. Tappen*, 5 *Johns. Ch. Rep.* 517. Where the deed creating the trust directs investments *of the interest*, and this is not done, compound interest is charged. *Raphael vs. Boehm*, 11 *Ves.* 92. S C. 13 *Ves.* 407, 411. And this because such is the law created with the trust. *Darne & Gassaway vs. Catlett*, 6 *Harr. & Johns.* 475. The judgments obtained by *Maund* might be considered, until the year this court decided the case, a claim existing against *T. Ringgold*, and possibly to be paid out of the trust fund. In support of the position that interest is not to be charged pending that suit, it is only necessary to refer to the case of *Newton vs. Bennett*, 1 *Bro. Ch. Rep.* 359. There the true principle, by which courts are to be governed, is laid down. In that case it will be found that *Bennett* did not take necessary steps to settle the estate. He retained money in his hands for several years. In 1760, the claim against the estate was compromised. "Till then, (says the chancellor,) it does not appear that *Bennett* kept the money in his hands *without a cause*, there being an outstanding demand." While there was a cause for keeping the money in his hands, while there was an outstanding claim, the chancellor at once decides that he is not to pay interest. "From 1760 the question is, whether he shall pay interest, having applied the money in the course of his trade." And from 1760 he was ordered to pay interest. According to this decision, while the demand of *Maund* was outstanding, the trustees did not retain the money in their hands *without cause*, and they are not to be charged with interest. It may be cited to prove that the complainants are entitled to interest from the decision of this court in *Maund's* case, as the trustees did not then invest; but the answer to this is, that before that decision, *T. Ringgold* was dead—the new bill had been filed, and the administratrix, and all persons having any claim to the estate, filed another bill, claiming the estate as it was, and insisting, not that it should be invest-

ed, but that it should be delivered up to them. From that time the trustees did not resist the claim, but consented that an account should be taken, and the trust settled up. On this point they referred also to *Littlehales vs. Gascoyne*, 3 *Bro. Ch. Rep.* 73. *Franklin vs. Frith*, *Ib.* 433. *Tew vs. Earl of Winterton*, 1 *Ves.* jr. 450, 451. *Pybus vs. Smith*, *Ib.* 193. *Bruere vs. Pemberton*, 12 *Ves.* 385. *Langford vs. Gascoyne*, 11 *Ves.* 333. *Rocke vs. Hart*, *Ib.* 59, 60. The mere act of co-operation does not charge a co-trustee with interest. *Bacon vs. Bacon*, 5 *Ves.* 331. *Chambers vs. Minchin*, 7 *Ves.* 192. *Langford vs. Gascoyne*, 11 *Ves.* 334. *Shipbrook vs. Hinchinbrook*, 16 *Ves.* 478. *Brice vs. Stokes*, 11 *Ves.* 324.

4. On the *fourth* point. In *England* a *per diem* is allowed to trustees for their trouble, &c. but that is not the rule here. The practice in our court of chancery is to allow a certain sum of money by way of commission. In the execution of this trust, the trustees have had a great deal of trouble, and the compensation to be allowed to them does not come within the rule as now established in chancery.

*Berrien*, *Hoffman*, and *Mayer*, for the Appellees, in the *first* appeal, on the *first*, *second*, *third* and *fourth* points.

1. On the *first* point. The alleged *exchange* of *Hopewell* for the *ferry property*, was *dehors* the powers of the trust, and wholly illegal. 1. This was no technical exchange, even had the trustees possessed the power to exchange. *Shep. T.* 295. *Co. Litt.* 31, *s.* 319. If this transaction rested only on the deed of 1798, Mrs. *Ringgold* would have dower in the *ferry property*, as well as in *Hopewell*. *Cass vs. Thompson*, 1 *New Hamp. Rep.* 65. 2. The sale or exchange was too hasty. *Ex parte Bennett*, 10 *Ves.* 393. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 110. 3. The ferries were not trust estate. *Tafford vs. Boehm*, 3 *Atk.* 440. A trustee cannot, even without *mala fides*, invest in a fund not sanctioned by a court of equity. If the court does not adopt the fund, the trustee must bear the loss. *Hancon vs. Allen*, 2 *Dick.* 498. A trustee, guardian, &c. cannot, without *special* power, change the nature of the estate from money into land, or *e converso;* or a lease for years into a freehold. *Witter vs. Witter*, 3 *P. Wms.*

100, (and *notes.) Terry vs. Terry*, *Pre. in Chan.* 273. *Mason vs. Day*, *Ibid* 319. *Pierson vs. Shore*, 1 *Atk.* 480. *Rook vs. Warth*, 1 *Ves.* 461. *Audley vs. Audley*, 1 *Dick.* 16, 45. 1 *Ves. jr.* 35. 6 *Ves.* 487. 4. The value of *Hopewell* must be fixed at $20 per acre. When a trustee displaces, destroys, or unduly converts trust property, chancery will give to the *cestui que trust* the *extreme value of it*, analogous to the rule of law of giving, in trover, the *highest* value, unless the article be shown to be certainly of less value. *Amory vs. Delamiere*, 1 *Stra.* 505. As the trustees declined to ascertain its value by several offers, and have thereby rendered it extremely difficult to say what it was really worth; as it might have brought at some subsequent period, even $30 per acre, the complainants are entitled to the highest value, even on the principle of confusion, mixture, &c. of trust, with private estate, as settled in *Lupton vs. White*, 15 *Ves.* 439, 440. *Attorney General vs. Fullerton*, 2 *Ves. & Bea.* 263. *Earl Powlet vs. Herbert*, 1 *Ves.* 296. *Forrest vs. Elwes*, 4 *Ves.* 491, 497. *Pocock vs. Reddington*, 5 *Ves.* 794. *Harrison vs. Harrison*, 2 *Atk.* 121. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 62, 116, 117. 5. None of the expenditures on the ferries can charge the trust estate. *Bostock vs. Blakeney*, 2 *Bro. Ch. Rep.* 653, 656. *Green vs. Winter*, 1 *Johns. Ch. Rep.* 27, 39. 6. Wherever the trust is violated, the *cestui que trust* is entitled to all the *gain*, if there be any, and an exemption from loss, if there be any. *Adye vs. Fenilletean*, 1 *Cox*, 60, 63, and the authorities before cited.

The trustees are not entitled to *any* benefit from *Thomas Ringgold's* sanction or approbation of the conduct and accounts of the trustees; that independently of various known principles, flowing from the relation of trustee and *cestui que trust*, he was, in fact, incompetent so to do, from the infirmity of his mind, which rendered him *non sui juris*, and which was the very *causa et origo* of the trust. Neither to the whole amount, nor any part thereof, can *Thomas Ringgold's* sanction protect the defendants from legal scrutiny, and liability to make full redress. 1 *Pothier on Oblig.* 29, 30. *Newl. on Cont.* 362, 433, 445, 451, 459. *Portington vs. Eglington*, 2 *Vern.* 189. *Sugd.* 401. *Gibson vs. Geyes*, 6 *Ves.* 226. *Hu-*

*guenin vs. Baseley*, 14 *Ves.* 273. *Villars vs. Beaumont*, 1 *Vern.* 100. *Smith vs. French*, 2 *Atk.* 243. *Newman vs. Payne*, 2 *Ves.* 199. *Duke of Hamilton vs. Lord Mohun*, 1 *P. Wms.* 118. 3 *Wood. Lect.* 453. *Wells vs. Middleton*, 1 *Cox*, 112. *Morse vs. Royall*, 12 *Ves.* 374. 4 *Desauss.* 704. *Stanhope vs. Topp*, 2 *Bro. Ch. Rep.* 183. *Murray vs. Palmer*, 2 *Scho. & Lef.* 474. *Matthews vs. Dragaud*, 3 *Desauss.* 25, 26, 27. *Green vs. Winter*, 1 *Johns. Ch. Rep.* 35, 36. *Wendell vs. Van Renssellaer*, *Ibid* 344. They then argued, that the liability of the trustees as to *Hopewell*, was to be determined under the terms of the deed of trust of December 1807; but that, if that deed was not to be the rule of their responsibility, then that even under the deed of 1798, *Thomas Ringgold* had no power left of disposing of *Hopewell*, or sanctioning the exchange of it for the *Ferries;* and to maintain this position, they discussed the limitations of the deed of 1798, in reference to the quantity of estate under it in *Thomas Ringgold*, and the principles of the rule in *Shelly's* case.

They argued, that there was no fund whatsoever in the hands of the trustees, of which *Thomas Ringgold* had any control, and to which his sanctions were applicable; that the bonds and securities derived from *Benjamin Ringgold's* trust administration, were comprehended under the term of equitable estate in the deed of 1798—but that at all events those securities were realized long before the sanctions of *Thomas* were given, and the avails applied or applicable to payment of *Thomas's* debts, so that there was no control in *Thomas*, over these funds, at the time of his sanctioning the accounts of the trustees; and even to the extent of those avails, the sanctions could not have any effect. That in this view, it did not matter, whether the securities for the sales of *Thomas's* land, that came into the hands of the trustees from *Benjamin*, passed them under the deed of trust of 1798.

They also argued, that the personal estate on *Hopewell*, and *Huntingfield*, was to be deemed as sold under the deed of December 1807, as to the liability of the trustees; and even if that were not so, the trustees were to be held liable for it in consequence of their admissions respecting it, and blending it with their accounts of assets and payments, as trustees.

2. On the *second* point. The trustees are jointly, as well as severally responsible for all monies, property, &c. received by them, or either of them. And if not so *a priori*, yet they have become so from the circumstances attending their administration of the trust. The distinction between executors and trustees, in regard to their responsibility *in solido*, is fully admitted; but the law has too firmly settled and defined the *principle* of the joint liability of *trustees*, to admit of its being at all affected, by the well known distinction between executors and trustees. But admitting its fullest force, it has no application whatever to trustees, except where the conduct of the trustee, claiming an exemption, has been strictly within the bounds of his trust duty, and where the delinquent trustee was in no way facilitated by the acts or omissions of his companion. This principle will be found to pervade all the authorities, and to afford the true key which ascertains the liability *in solido* of trustees, and is a principle wholly independent of the one which ordinarily implicates *executors*, and exempts *trustees*. The received law on the subject is, that trustees and executors, *prima facie*, are equally responsible, *virtute officii*, for all monies, &c. received on account of the trusteeship or administration. But where, *in point of fact*, only one has received money, &c. there is generally a difference between executors and trustees as to the *evidence* which implicates them *in solido*. For executors need not join in any receipt, or conveyance; they are competent to act *separatim*. Trustees, on the contrary, are expected to unite in receipts, and must join in conveyances. Hence, if executors unite, they are both liable at *law*, though one only may have received the money. At *law*, there is a *presumptio juris et de jure*, that they both received it, and therefore both liable; but in equity, the facts may be inquired into, and they be charged jointly or severally, according to circumstances. A *joint* receipt or conveyance, however, even in equity, raises a strong presumption against both, be they executors or trustees; but even in the case of *executors*, it is not conclusive in equity. Trustees, on the other hand, do not at *law*, or in *equity*, materially *increase* the presumption of joint responsibility by uniting in receipts, because they are expected so to do, even

when, *in fact*, they do not jointly receive the money. As the doctrine has been modelled, and fully established, there appears to be little or no distinction in equity between trustees and executors. The distinction between executors and trustees, in this respect, never did extend further than as it was a mere *question of evidence*, arising from their *jointly receipting*. The inquiry, now, in either case, is not so much in relation to *joint receipts*, &c. as it is into the various acts of co-operation, omission, undue confidence, and untrustworthy conduct on the part of that trustee, or executor, who claims an exemption. If, therefore, a trustee or executor, by any *act*, *omission*, *supine negligence*, or *undue confidence*, abandons any portion of the fiduciary estate to his companion, so as to tend to its jeopardy or final loss, this *per se* is a breach of trust, and subjects such trustee or executor to all losses consequent on such *crassa negligentia*, without any regard to acts of direct co-operation, such as receipts, conveyances, &c. &c.; and *all the modern authorities have uniformly charged trustees, in solido*, under the auspices of this principle. But we fully admit, that if one trustee, *ex mero motu*, and without the *concurrence* or *neglect* of his companion, secures and wastes a portion of the trust fund, the innocent trustee is not responsible for his defalcations, and this too, even though there has been joint receipts and joint conveyances. This case may be safely reposed on this liberal view of the doctrine of joint and several liability. No case can be found which exempts a trustee, merely because he received *no portion* of the wasted estate. Both law and equity requires a further scrutiny, and the received doctrine is, that the *only important inquiry is, whether the companion who wasted the estate was in any degree facilitated therein by the acts or omissions of the other; if so, they are both equally liable.* All the authorities now concur that the inquiry is not as to the evidence of the existence, or non-existence of joint receipts or conveyances—this being a mere *prima facie* evidence of responsibility *in solido;* but the fact to be ascertained is, whether one trustee has *suffered* another to obtain such an *exclusive* control, as enabled that trustee to violate the trust. In such case, they are both liable, one as the *receiver* and *destroyer* of the trust

estate, the other as the *passive means* of the mischief which has been done. Hence, if a trustee *joins* in receipts, &c. he may still be *exempted*; and if *he does not join*, he may still be charged. The nature of the trust also is very material to be *inquired* into. Whenever the trust is *directory*, and not *discretionary*, they are bound to *see to each other's acts*. The counsel for respondents were ever willing to lose sight of this important principle. The trustees were expressly bound to *invest*, and in *specific funds*; they jointly invested in *different* funds, and also jointly omitted to invest the balance in any fund. *Negligence*, and a non-performance of *prescribed duties*, is the controlling circumstance which ascertains the liability *in solido*. Trustees are always liable, *in solido*, for the acts of *agents*, if they are not *expressly* authorised to appoint agents. If, therefore, *Samuel* constituted *Thomas* his agent, as he says he did in the *M'Mechen* transaction, or if he permitted *Tench* to assume an exclusive control of any portion of the estate, he thereby constituted him an agent, and both are responsible in these cases, for any losses that may arise. *Samuel* never was in advance, except by reason of his own gross negligence in permitting *Tench* to violate every principle of the trust; and after the mischief was done, *Samuel*, conscious of his neglects, omissions, and untrustworthy acts, and that he must respond for *Tench*, received from him an *ample indemnity*. But if the *facts* of the case be inquired into, the question of joint and several responsibility, even if decided in favour of the respondents, would cover but a small part of the case—*because there are but very few transactions in which they did not unite, and positively participate*, which would render them responsible even on the most favourable application to the respondents, of the doctrine in controversy—so that *quacunque via data*, they are liable *in solido*. But the law is now fully settled. *In all* of the cases, when cautiously examined, from the case of *Townley vs. Chalenor*, *Cro. Car.* 312, down to *Monell vs. Monell*, 5 *Johns. Ch. Rep.* 283, it will be found that the courts have been gradually advancing to the positions we have laid down; and the many *moot* points of distinction between joining and not joining in receipts, &c. between the liability at law, or in equity;

between the responsibility *in solido* of executors, and not of trustees; between the claims of creditors on executors, or legatees on executors, &c. &c. have all, in succession, been nearly abandoned, and the plain, *elementary* doctrine of all courts now is, *that they will look to the conduct both of trustees and executors, and if the loss be the fault entirely of one,* he alone *shall respond; but if it be the result of the acts, omissions, gross negligence of the other, they shall both equally respond.* It never was decided, that if *one only* reaps the fruits, or receives the money, after a *joint breach of trust,* both shall not respond; but the true distinction is as just stated, viz: that wherever any one, acting in a fiduciary relation, permits his companion to exercise any control over the trust fund, *inconsistent* with the obligations of *both,* (and whether there be an *agreement* to that effect, or a mere *supine negligence,* is immaterial,) they both are liable *in solido.* Hence, the fact of *receipting jointly* is a mere item of evidence, even in the case of *executors,* and the main inquiry is not even *who received* the money, but whether there has been any *acquiescence* in one, after he *knew,* or ought to have known, that the trust money, &c. *had got into a course of abuse."* Nor is it at all requisite, in order to charge both for the defalcations of one, that there should be any fraud, sinister motive, or profit in the trustee who claims exemption.

Admitting then the fullest force of the *general* distinction between co-executors, and co-trustees, the whole current of authorities sustain the positions advanced. They then cited *Churchill vs. Hobson,* 1 *Salk.* 318. S. C. 1 *P. Wms.* 241, *(and note.) Townley vs. Calenor, Cro. Car.* 312. S. C. *Bridg. Rep.* 35. *Fellowes vs. Mitchell & Owen,* 1 *P. Wms.* 81. S. C. 2 *Vern.* 504, 515. 21 *Vin. Ab.* 583, pl. 2, 8. *Murrill vs. Cox & Pitt,* 2 *Vern.* 570. *Westley vs. Clarke,* 1 *Eden's Rep.* 356; and 1 *P. Wms.* 83, *(note.)* S. C. 1 *Dick.* 329. *Townsend vs. Barber,* 1 *Dick.* 356. *Leigh vs. Barry,* 3 *Atk.* 583. *Gill vs. Attorney General, Hardres,* 314. *Charitable Corporation vs. Sutton,* 2 *Atk.* 404, 405, 406. *Boardman vs. Mosman,* 1 *Bro. Ch. Rep.* 68. *Sadler vs. Hobbs,* 2 *Bro. Ch. Rep.* 116. *Scurfield vs. Howes,* 3 *Bro. Ch. Rep.* 90. *Keeble vs. Thompson, Ib.* 112. *Baldren vs. Scott,* 2 *Ves.* 678.

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*Hovey vs. Blakeman*, 4 *Ves.* 506, 603, 608. *Caffray vs. Darby*, 6 *Ves.* 487. *Chambers vs. Minchin*, 7 *Ves.* 186, 196, 199. *French vs. Hobson*, 9 *Ves.* 103. *Lord Shipbrook vs. Lord Hinchinbrook*, 11 *Ves.* 252. S. C. 16 *Ves.* 476. *Brice vs. Stokes*, 11 *Ves.* 318, 319. *Langford vs. Gascoigne*, *Ib.* 333. *Adair vs. Shaw*, 1 *Sch. & Lef.* 340. *Doyle vs. Blake*, 2 *Sch. & Lef.* 229, 237, 242. *Townshend vs. Baber*, 1 *Dick.* 156, 356. S. C. *Bridg. Rep.* 38. *Underwood vs. Stevens*, 1 *Meriv.* 712. *Westley vs. Clarke*, 1 *Eden*, 357. *Anonymous*, 12 *Mod.* 560. 21 *Vin. Ab.* 525, pl. 2, 3, 4. 2 *Fonbl.* 182, *(note l,)* 183. 1 *Cruse's Dig.* tit. 12, *s.* 36, 37, 39. 2 *Brid. Ind.* 651. *s.* 214, 221, 224, 238, 239, 242. *Ham. Dig.* 643, 297, 298, (s) (d) (u). *Toller's L. Ex.* 485, 486. *Monell vs. Monell*, 5 *Johns. Ch. Rep.* 283. 11 *Johns. Rep.* 21. *Munford vs. Murray*, 6 *Johns. Ch. Rep.* 1, 452. *Lenoir vs. Winn*, 4 *Desauss.* 65, 76. 6 *Mod.* 93. 2 *Eq. Ca. Ab.* 742. 12 *Mod.* 573. 5 *Ves.* 839. 8 *Ves.* 363.

3. On the *third* point they cited *Franklin vs. Frith*, 3 *Bro. Ch. Rep.* 433. 2 *Fonbl. Newton vs. Bennet*, 1 *Bro. Ch. Rep.* 359. *Treves vs. Townsend*, *Ib.* 384. *Foster vs. Foster*, 2 *Bro. Ch. Rep.* 616.

4. On the *fourth* point they cited *Fearns vs. Young*, 10 *Ves.* 184.

*Berrien*, *Hoffman*, and *Mayer*, for the Appellants, in the *second* appeal, on the *fifth*, *sixth*, *seventh* and *eighth* points.

5. On the *fifth* point. The auditor in his report esteems the answers, as to all matters of account, as of themselves final proof, and that as to such matters the answers are simply responsive, and not, in any measure, in avoidance. To enforce this singular doctrine, he also relies on the difficulty of the trustees getting proof, or producing vouchers after such a lapse of time. The chancellor also adopts this reasoning, and appears to have entirely misapprehended some of the clearest authorities on this point. The complainants fully admit the general rule that an answer is *per se* proof, and requires counter evidence of at least one witness and pregnant circumstances, but contend that this rule has no application whatever to the present case. The positions taken by the complainants are these:

1. That they have never relied, in any degree whatever, on information furnished by the answers, but on the contrary, have proved, by independent testimony, the entire amount with which they charge the defendants. 2. That the disbursements by the trustees are in all instances, except such items as postage, current expenses, and such like, to be sustained by proof, or vouchers; and that the answers, setting forth disbursements, are not responsive merely, but in *avoidance*, and set up *claims*, which must be sustained by proof; and no authority can be found which gives to an answer any operation beyond this. 3. That no court will allow respondents to rely at all upon answers, which come reluctantly in, after all the proofs are furnished by the complainants, and they have been driven to the necessity of searching every where for evidence, without the least reliance on any light shed by the answers. 4. That where a distinct fact is set forth in the bill, and denied by the answer, or where information on a particular subject is requested by the bill, and furnished by the answer, then the answer is evidence; but a bill which merely asks for an account, is not of that nature which enables the respondents to *make proofs for themselves*, by stating that so much was received, and so much paid away. The books have never gone to that length, and all principles, and authorities, we apprehend, sustain a doctrine just the reverse. 5. The utmost liberality has been manifested by the complainants, in writing *"admitted"* on every *fair* and *comprehensible* voucher: and this was asked for by the respondents, and granted by the complainants under the idea that the *answers* proved nothing, and that all accounts not *thus admitted*, or *proved* by the respondents, were *not fortified* by the answers. 6. The cases which admit a defendant's answer as proof for him, are always where some fact alleged by the bill is *denied;* and there is a clear distinction between *denial* and *affirmation*, setting up *a claim*, and swearing himself *into a right;* so also these cases distinguish between matters susceptible of proof, and such as lie, from *their nature*, within the *knowledge* and *conscience* of the respondent. 7. It is also to be borne in mind, that in many of the cases which allow this force to the answers of defendants, the parties were examined as *witnesses* on interrogatories before the master, a proceeding

unknown to our practice. Such was the case of *Kirkpatrick vs. Love, Ambler*, 589, and many others. 8. We are also to distinguish between reading an *answer* in chancery, in *another* suit, or in a *suit at law;* and where it is read in *equity*, in the same suit—there the *established* doctrine is, that *one part* of an answer *may* be read against the party, without reading the other, and the complainant *may* select a particular admission and rely on it, and yet put the defendant to prove *other facts;* and the *whole current* of authorities sustain this. *Norris' Peake's Evid.* 86, *(note.) Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 88, 89. 2 *Poth. on Obl.* 155 to 158, *(and note.)* 9. But even if the doctrine be *enlarged* for the benefit of the respondent, it never applies except where the answer is clear, satisfactory, and pointed; it never embraces general statements, schedules, &c. which do not fix the force of the *oath* pointedly on the particular transaction. In this point of view, *Samuel's* answer has no application to the *M'Mechen, Wilmer's*, and other transactions; nor can *Tench's* answer fortify *Samuel's* alleged disbursements. They cited *Alam vs. Jourdan*, 1 *Vern.* 161. *Anonymous*, 1 *Vern.* 282. *Wickerly vs. Wickerly*, 1 *Vern.* 470. *Walton vs. Hobbs*, 2 *Atk.* 19. *Janson vs. Raney*, 2 *Atk.* 140. *Robinson vs. Cumming*, 2 *Atk.* 410. *Ouly vs. Walker*, 3 *Atk.* 407, (2 *Com. Dig.* 332.) *Pemba vs. Mathers*, 1 *Bro. Ch. Rep.* 52. *Kirkpatrick vs. Love, Ambler Rep.* 589. *Blount vs. Burrows*, 4 *Bro. Ch. Rep.* 73. *Thompson vs. Lamb*, 7 *Ves.* 588. *Ridgeway vs. Darwin*, 7 *Ves.* 404. *Lady Ormond vs. Hutchinson*, 13 *Ves.* 47. *East India Co. vs. Donald*, 9 *Ves.* 275, 283. The leading case which establishes the sound doctrine on this subject, and which has never been repudiated, or in the least qualified, is the one which occurred in 1707, before Lord *Cowper*, and is reported by *Gilbert* in his *Law of Evidence*, 45. 3 *Blk. Com.* 451. The chancellor, in his decree, has passed on this case a most singular *criticism*, and one which, we think, is far from just. We do not perceive the least "*ambiguity*" in the case; for surely it does not mean that one who was *dead*, made a donation; or that one who was *alive* at the time, was then a *testator*. But it simply means that the defendant had, in the lifetime of his testator, received a deposit of £1100, and

that on a settlement between him, who *afterwards* was a testator, with him who *afterwards* was an executor, £100, part of the £1100, was given to the defendant in satisfaction of the services he should subsequently render as executor. This case is commented on, and entirely approved of by Chancellor *Kent*, 2 *Johns. Ch. Rep.* 88. That £1100 was the entire sum *deposited*, was proved by the answer, but the *gift* of £100 required proof *aliunde*. 2 *Ball and Beatty*, 382; *Ham. Dig.* 425, (a). 1 *Bro. Ch. Rep.* 502; 2 *Com. Dig.* 332; 2 *Fonb. chap.* 7, *s.* 4. An *answer per se*, perhaps, should never be evidence against an *infant cestui que trust*. Trustees ought to be *compelled* to keep books, *take*, and *preserve* vouchers: but here are *thousands* of dollars claimed by the trustees on no voucher whatever. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 62, 66, 86 to 94, 96, 107, 119. This case assembles nearly all the *English* and *American* cases, and the entire bearing on the subject. *Green vs. Hart*, 1 *Johns. Rep.* 589, 590. *Monell vs. Monell*, 5 *Johns. Ch. Rep.* 283, 294, *&c. Parker vs. Kennedy*, 2 *Desauss.* 37. *The State vs. Penman*, 2 *Desauss.* 1. *Beckwith vs. Butler*, 1 *Wash. Rep.* 225. *Ballinger vs. Worley*, 1 *Bibb*, 195. *Paynes vs. Coles*, 1 *Munf.* 373. *Scurfield vs. Howes*, 3 *Bro. Ch. Rep.* 90, 95. Here the answer of a co-trustee, charging himself *exclusively*, was not, *per se*, considered as evidence of the separate receipt, and liability. *Miller vs. Beverleys*, 4 *Hen. & Munf.* 422. *Pollard vs. Lyman*, 1 *Day*, 165. *The Auditor vs. Johnson*, 1 *Hen. & Munf.* 536. *Heffner vs. Miller*, 2 *Munf.* 43. *Beatty vs. Thompson*, 2 *Hen. & Munf.* 395.

The object of the trust was investment, and all that interfered with that, or retarded it, should be affirmatively and unquestionably shown. The trust fund was to be *diminished* as *little* as *possible;* and therefore the necessity of the payments should be shown. Payments here are in the nature of counter-claims, on the part of the trustees, against their *cestui que trusts*, and, therefore, should be proved; and on that head the answer could not, in the nature of things, be deemed responsive to the bill, unless the bill had charged *specific* breaches in particular *undue payments* by the trustees. They argued this was in effect only a general bill for an account; and

that it was a *petitio principii* to say that the answer was evidence of the payments it stated, because the bill required "a particular account of the trustees' transactions under the deeds of trust."

The answers of both of the trustees being reluctant, uncandid, unsatisfactory, and rendered only after all the proofs were obtained by the complainants, are to be received with great caution, and to be construed by the court dubiously, and with scrutiny; allowing to them much less respect and weight than might have been accorded to them, had they been *in time*, *willing*, *full*, and *candid*. *Freeman vs. Fairlie*, 3 *Meriv.* 29, 41. *White vs. Williams*, 8 *Ves.* 193. *Haim. Dig.* 421, *s.* 5; 422, (k,) 425, (a.) *Green vs. White*, 1 *Johns. Ch. Rep.* 33, 40. *Hart vs. Ten Eyck*, 2 *Johns, Ch. Rep.* 62, 107, 108. *Faulder vs. Stewart*, 11 *Ves.* 303. *Smith vs. Scarle*, 14 *Ves.* 415. 2 *Madd. Ch.* 343. *Hepburn vs. Durand*, 1 *Bro. Ch. Rep.* 503. 3 *Meriv. Rep.* 29, 41.

6. On the *sixth* point. Interest is to be charged on all receipts from their *dates*, as the trustees never invested, and never *intended* to invest. That if a rest of *six months* be allowed, they are then chargeable with *compound* interest, or interest on the *annual balance of principal and interest*. The authorities clearly establish the following positions: 1. Trustees, executors, &c. are chargeable with simple interest wherever there were disposable funds of the estate in their hands, which the exigencies of the estate did not necessarily *prevent* being placed at interest. 2. If they be empowered to put money to interest, and merely let it *remain idle by them*, they are responsible. 3. If they have traded with the trust funds, they are not only liable to interest, but to the *profits*, if any, beyond the interest. 4. If they retain monies by them, hesitating what to do, they shall pay interest, as it was their duty to apply to the court of chancery for instructions. 5. Whenever the least in fault, they are chargeable in *England* with the highest interest, viz. 5 *per cent.* if not in fault, then with 4 *per cent.*—money being usually worth no more in that country. 6. Wherever their duty is *prescribed*, as for example, to *invest*, and they have neglected it, but which, if performed, would have given the *cestui que trust*

interest upon interest, the trustees shall be liable to *compound* interest, or interest on the annual balances of principal and interest. 7. *Formerly*, interest was allowed only from the *time of audit*, if respondent answered freely and fully, and from the time of the *bill* filed, if reluctantly; now, no such distinction—but trustee is liable from the time he might have invested. Upon the subject of *simple interest*, they cited 10 *Mod.* 21. 2 *Eq. Ca. Abr.* 740. *Parrot vs. Treby*, *Pre. in Ch.* 254. *Newton vs. Bennet*, 1 *Bro. Ch. Rep.* 35, *(and note a.)* *Perkins vs. Baynton*, 1 *Bro. C. R.* 375. *Treves vs. Townshend*, *Ib.* 384. *Dawson vs. Massey*, 1 *Ball & Beatty*, 219. *Tebbs vs. Carpenter*, 1 *Madd. C. R.* 290. *Forbes vs. Ross*, 2 *Bro. C. R.* 430 *Littlehales vs. Gascoyne*, 3 *Bro. C. R.* 73. *Franklin vs. Frith*, 3 *Bro. C. R.* 433. *Hillard's* case, 1 *Ves.* 90. *Young vs. Combs*, 4 *Ves.* 103. *Forrest vs. Elwes*, 492. *Piet vs. Stacc*, 4 *Ves.* 620, 622. *Pocock vs. Reddington*, 5 *Ves.* 794. *Rock vs. Hart*, 11 *Ves.* 57, &c. *Bruyere vs. Pemberton*, *Ib.* 386. *Ratclif vs. Graves*, 1 *Vern.* 196. 2 *Ver.* 744. 1 *P. Wms.* 396. *High. on Lunacy*, 77. "The *first* duty of a trustee, executor, agent, receiver, &c. is to be constantly ready with his accounts, and neglect in this, charges them with interest." *Heathest vs. Hulme*, 1 *Jac. & Walk.* 122, 135. *Massey vs. Banner*, *Ib.* 250. *Turner vs. Turner*, 1 *Jac. & Walk.* 43. *Treves vs. Townsend*, 1 *Cox*, 50, (note 2.) *Forbes vs. Ross*, 2 *Cox*, 112, 113, &c. 2 *Madd. Chan.* 134. 2 *Fonb.* 184 to 188, *notes (o) (p.)* *Mosely vs. Ward*, 1 *Ves.* 581. *Dornford vs. Dornford*, 12 *Ves.* 127. *Stock vs. Stock*, 1 *Desa. C. R.* 193, *(note.)* *Fox vs. Wilcox*, 1 *Binney*, 195. *Hall vs. Callaghan*, 1 *Serg. & Rawle*, 241. *Lenoir vs Winn*, 4 *Desa. C. R.* 71, 454. *Miller vs. Beverly*, 4 *Hen. & Munf.* 415 to 418. *Quarles vs. Quarles*, 2 *Munf.* 321, 325. *Carter's Ex. vs. Cutting and Wife*, 5 *Munf.* 223, 233. The existence of *outstanding debts* has never been considered as justifying trustees' omission to invest, or at all affecting their responsibility for interest. If the monies had been invested in stock, instead of the ferries, this item alone would have produced, *at this day*, $53,000. *Maund's* debt was nominal, and to the amount *claimed*, they might have *invested* as well as *retained;* for the judgment was enjoined, and *Maund never*

made any motion to *dissolve*, nor the respondents to *perpetuate;* but twenty years after the injunction, the *complainants* themselves, (the *trustees* having *abandoned* the trust,) obtained its dissolution. *Gray vs. Thompson*, 1 *Johns. C. R.* 82. *Dunscomb vs. Dunscomb*, 1 *Johns. C. R.* 508, 535. *Shiffelin vs. Stewart*, 1 *Johns. C. R.* 620. *Brown vs. Ricketts*, 4 *Johns. C. R.* 303. *Minuse vs. Cox*, 5 *Johns. C. R.* 441, 448. *Murray vs. Munford*, 6 *Johns. C. R.* 17, 452. 7 *Johns.* 265. 4 *Des.* 369, 556.

On the subject of compound interest they contended, 1. That compound interest is as moral and legal a claim as simple interest, wherever interest upon interest has been made, or might, and ought to have been made. The *interest*, upon the dividends or interest, must be somewhere, and if made, is the property of the owner of the principal:—if not made, and there is no *gross negligence*, the courts, so far favour a debtor, executor, guardian, or trustee, as not to charge them with it: but whenever the duty is plain, and it has been clearly violated, compound interest is uniformly allowed by the decisions, not only of *England* and the *United States*, but of most other countries. 2. Where the trust directs investment, and none is ever made, but, on the contrary, the trustee never intended to make any, the courts uniformly allow compound interest, or, what amounts to the same, the interest is added on the *yearly balances* of principal and interest. 3. Merely as between *debtor* and *creditor*, interest upon interest is rarely allowed—but still compound interest is as recognised a right in certain cases, as simple interest is. They cited *Waring vs. Cunliffe*, 1 *Ves.* Jr. 99, *(and note* 1.*)* *Schiffelin vs. Stewart*, 1 *Johns. Ch. Rep.* 624 to 629. *Newton vs. Bennet*, 1 *Bro. C. R.* 359. *Earl of Lincoln vs. Allen*, 6 *Bro. P. Ca.* 319. *Robinson vs. Cumming*, 3 *Atk.* 410. *Raphael vs. Boehm*, 11 *Ves.* 92, 108, 109. *Hammond's Dig.* 332, *s.* 5. *Ashhurnham vs. Thompson*, 13 *Ves.* 403. *Raphael vs. Boehm*, 13 *Ves.* 407, 590. *Peirce vs. Rowe*, 1 *New Hamp. Rep.* 183. *Dornford vs. Dornford*, 12 *Ves.* 127. *Kennon vs. Dickins*, *Cam. & Norw.* 361. *Nightingale vs. Lawson*, 1 *Bro. C. R.* 440, 443. The case now before the court, is one demanding the allowance of compound interest much more strongly than

in the case of *Catlett vs. Darnes*, 6 *Harris & Johns. Rep.* 475, 482. In this case, it is proved that the trustees have speculated on $18,000, at least, of the trust estate. They not only never invested one cent as directed, but they invested $18,000 in a wild speculation of their own. They completely amalgamated the *entire trust* estate with their own. They not only let monies remain idle, but being directed to invest, they used the trust money, paid *no debts* until compelled, and involved the estate into costs, and fees of all kinds. Even the allowance of compound interest might not fully indemnify the complainants; and though trustees are not to be severely dealt with in cases of mere negligence, yet when their duty is plain, and they have never manifested the least intention to make the estate productive, and to surrender their talent with its proper increase, equity not only allows compound interest, but will scrutinise every account. Giving therefore, the fullest extent of the *odium* justly attached to *compound interest*, when it is used as a means of unseemly gain, the *courts adopt it with alacrity, as the only means of attaining justice*, wherever persons in fiduciary relations, have forgotten the *widow's* and the *orphan's* portion, and heedlessly disregard plain directions, and simple duties.

They argued that the pendency of *Maund's* claim did not exempt the trustees from the charge of even compound interest; and examined the authorities cited on the other side, in the previous argument, as to the effect of outstanding claims, to relieve trustees from the charge of interest; and contended, that it was incumbent on the trustees, in order to exempt themselves from the charge, to show that they had deposited the money in chancery, or secured it under the sanction of chancery, so as always to be ready for the *cestui que trusts*, or to meet the judgment of *Maund;* and that it was the duty of the trustees, to save themselves from interest, to apply to the chancellor to have the funds, adequate to *Maund's* judgment, invested, while the suit, in regard to the judgment, was pending; and as the time of its termination was, of course, uncertain.

7. On the *seventh* point, they contended, 1. That the settled and unvarying doctrine of the common law is, that private trustees, who have not stipulated for a compensation, act *gratui-*

*tously*, and that no compensation or reward can be decreed to them. That under the head of "just allowances," their necessary charges, and a small indemnity for days or time *actually* spent in executing trust duties, will be granted, when the *time is clearly* made out. 2. That no statute, act of assembly, or rule of court, having altered this established law, this court, if it allows commissions in this case, must judicially legislate. And though the validity of even a *rule of court*, in such case, might be questioned, yet as there is no such rule, a *decision* in this case, contrary to the common law, and in the absence of any statutory provision, or rule of court, would be a decree establishing a *rule retrospectively*. 3. That even if commissions be allowable, it is still not a *fixed* commission of 5 per cent. but is under the *discresion* of the court; and as *no service* has been rendered, and all *expenses* have been liberally allowed, this court will not go beyond a *per diem*, which the trustees have failed to prove: or if a commission, in lieu of a *per diem*, then a commission of one or two per cent. for the sake of approximation to a *per diem*. 4. That if compound interest be refused to complainants, that then the entire commissions ought to be refused to the respondents, as the former claim rests on moral and legal reasons; the latter, on moral grounds only, and this too, only in the case of zealous and meritorious services, and a willing, full, and satisfactory settlement. And the court's discretion will be applied both to the *fact of the allowance*, and the rate of commission. The *Roman* law was decided, that nothing beyond reasonable and just expenses should be allowed to a trustee. *Lucrum facere ex pupilli tutela tutor non debet. Dig.* 26, 7, 33. *Domat*, book 2, *s.* 2, pl. 3; *s.* 3, pl. 35. The common law was always so as to bailiffs, guardians, &c. *Co. Litt.* 89. *Litt. s.* 123. So of a mortgagee in possession, 1 *Ver.* 316. 2 *Atk.* 120. 1 *Smith's Rep.* 252. 3 *Atk.* 518. 1 *Pow. on* Mort. 296. 2 *Pow. on* Mortg. 1072. As to *trustees*, the common law from the *earliest* times, down to the present day, has persisted in this principle. *How vs. Godfrey, Finch*, 361. *Bonithon vs. Hockmore*, 1 *Vern.* 316. *Scatterwood vs. Harrison*, Moseley's *Rep.* 128. *Robinson vs. Pett*, 3 *P. Wms.* 248. *Char. Corp. vs. Sutton*, 2 *Atk.* 406. *Ayliff vs.* Murray, 2 *Atk.* 52.

*Gould vs. Fleetwood*, 3 *P. Wms.* 351. *Amb.* 78. 4 *Ves.* 72 10 *Ves.* 184. *In re Ormsby*, 1 *Ball & Beatty*, 189. *Ham. Dig.* 641, *s.* 2, 3. *Highm. on Lun.* 70, 71. 1 *Cru. Dig.* 357, *s.* 42, 43, 44. 4 *Desau.* C. R. 368. *Green vs. Winter*, 1 *Johns.* C. *R.* 27, 37, 38, 43. *Manning vs. Manning*, 1 *Johns.* C. *R.* 527. *Mason vs. Roosevelt*, 5 *Johns.* C. *R.* 534, 540. *Munford vs. Murray*, 6 *Johns.* C. *R.* 1, 17.

8. On the *eighth* point. The complainants claim to charge *Tench* in all cases equally with his co-trustee, and if he exempts *Samuel*, he at the same time exempts himself. He is responsible for costs, as well as liable for all that may be decreed; so that he could not be examined even *de bene esse*. But as his interest in the event of the suit is now manifest, his deposition, if taken *de bene esse*, cannot be read; and if read is entitled to but little credit; as it is vague and unsatisfactory. They cited *Dixon vs. Parker*, 2 *Ves.* 219. *Bridgman vs. Green*, *Ib.* 629. *Downey vs. Townsend*, *Ambl.* 592. 2 *Eq. Ca. Ab.* 397, *pl.* 12. *Skin.* 673. *Murray vs. Shadwell*, 2 *Ves. & Bea.* 401, *(and note a.)* *Whipple vs. Lansing*, 3 *Johns. Ch. Rep.* 612. *Lee vs. Atkinson*, 2 *Cox*, 412. *Flodding vs. Winter*, 19 *Ves.* 196.

*Wirt*, (Attorney General of *U. S.)* *Jones*, *Taney*, and *Magruder*, for the Appellees in the *second* appeal, on the *fifth*, *sixth*, *seventh* and *eighth* points.

5. On the *fifth* point, as to the effect of the answers. Several of the credits claimed by the defendants are objected to, because there is no evidence (except their answer,) in support of them. It becomes of importance, therefore, to ascertain whether so much of the answers as the defendants rely on, be evidence for them. The bill of complaint calls upon the defendants expressly to "render a particular account of their transactions under said deeds of trusts." "Whether they have paid any of the debts due from the said *Thomas Ringgold*, and *state the same.*" So much of the answers as the defendants would call to their aid, is strictly responsive to the bill. It is not necessary then to maintain the correctness of the ground taken by Chancellor *Johnson*. His opinion was, that if the complainants chose to make the defendants disclose on

oath any part of the transaction, they were bound to let the defendants disclose the whole. That the matter *in avoidance* of, as well as the matter *responsive* to the bill, was evidence for the defendants, if the matter in avoidance was matter strictly connected with the matter responsive. In this he evidently differed with Chancellor *Kent*, in *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 62, who on the authority of a case in *Gilbert's Law of Evidence*, 45, decided, (not that matter strictly responsive to, but) that no matter in avoidance of the bill, could be evidence for the defendant. In the latter case it was simply decided, "that the defendant must make out by proof," (not what is responsive to the bill, but) "what was insisted on *by way of avoidance.*" The matter stated in the defendants' answers is not in avoidance, but purely responsive to the bill. Nothing which the complainant's bill demands of the defendant to set forth in his answer, can be called matter in avoidance. The defendants have no interest, therefore, in disputing the correctness of Chancellor *Kent's* decision. If they had, it might be said for them, that it appears by the index to 7 *Johns. Ch. Rep.* 75, pl. 11, that his decree was reversed; and it is a thing unheard of that the supreme court of one state should borrow its law from the inferior court of another state, whose decision had been reversed by its own superior court. Many of the cases cited only go to show that the Chancellors were disposed to agree with Chancellor *Johnson*, as to what *ought* to be the law; that the decision in *Gilbert* is so often productive of mischief, that it is desirable oftentimes, for the purposes of justice, to escape from its operation. The doctrine of that case, however has been so long established, that it would be judicial legislation to overrule it. Yet it has not been longer settled, nor is it better known, or entitled to as much respect, as the rule for which we contend. "The general rule," (says Chief Justice *Marshall* in *Clark's Ex'rs. vs. Van Riemsdyk*, 9 *Cranch.* 160,) "that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer, *asserting a fact responsively to the bill*, is admitted." Yet the doctrine we have to combat, is that no witness is necessary to outweigh it; for that it is not evidence at all, unless perhaps the complainant is obliged

to rely upon it in order to make out his case. Widely different was the opinion of Chief Justice *Marshall.* He understood the rule, and reason of the rule. "The reason, (he adds,) on which the rule stands is this. The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence." If therefore there be but one witness in opposition to the answer, we have the oath of one man, and opposed to the oath of another, and the complainants' solitary, though disinterested, and it may be unexceptionable witness, will not outweigh the oath of the interested defendant. Such is the general rule of equity, founded when understood, in the strictest propriety. It is to be found in all the writers uniformly recognized and acted upon by learned chancellors, and yet to be questioned by any court of equity. "There is no principle," (says Chancellor *Hanson,* in *Hopkins vs. Stump,* 2 *Harr. & Johns.* 304,) "better established than this, that if a defendant be compelled to answer, whatever he says on oath shall prevail, unless refuted by the testimony of two witnesses, or of one witness with equitable circumstances." Such is the strong and conclusive language upon this point, of men whose opinions no judicial tribunal is at liberty to treat with disrespect. Such has been repeatedly declared to be the rule of equity by the former and present court of appeals of this state. Without alluding to others, in the case of *Jones vs. Sluby,* 5 *Harr. & Johns.* 373, it was explicitly admitted by this court that the answer, so far as it was responsive to the bill, was evidence, but declared to be only parol evidence. Surely the decisions of this court ought to be some evidence to itself of the law. But it is said that the defendants ought to have produced vouchers, and not to have relied on their own oaths. The answer to this is that it was not for the defendants to judge by which description of evidence they should establish their title to the credits which they claimed. The complainants were to make the choice for them, and they chose not to require the vouchers, which might deceive, but insist that they should be set forth in the defendants' answers, which were to be verified by their own oaths. Now suppose the defendants, in answering this bill, had omitted to state what debts had

been paid by them, but in answer to that part of the bill had offered to produce vouchers in support of the credits to be claimed by them, what might the complainants have done? Precisely what they did do, with the first answer of *Tench Ringgold*—excepted to it for insufficiency, and claim the statement which was to be verified, not by vouchers, but by their own oaths. The complainants have a right to insist, that they be furnished with proof of the several credits which the defendants claim. They do demand it, and it is furnished to them. They now complain of the absence of other proof—proof for which they did not call, and which of course they did not authorise the defendants to produce. Will it be pretended that the defendants had a right to burthen this case with voluminous records, judgments, decrees, bonds, with receipts in them, &c. &c. when the complainants, who were to be the exclusive judges of the necessity and propriety of calling for them, instead of asking for vouchers demanded only of the defendants to state in their answer "whether they have paid any of the debts due from the said *Thomas Ringgold*, and *state the same*." With respect to the disputed items, the charge against the defendants for the negroes taken from *Prospect Hill*, is conclusively refuted by several witnesses. The credit claimed by *S. Ringgold* for the money paid to *M'Mechen*, is established by the testimony of *Tench Ringgold*. Other proof could have been obtained in support of the credits now disputed, if it could have been surmised that they needed other vouchers. With respect to most, if not all of them, though disputed in this court, they were admitted in the court of chancery. The account, on which the complainants insist as the correct account, allows to the defendants the principal part of these credits; and though their exceptions are not to be regarded as exceptions here, yet they must be considered as assertions or admissions by the complainants. They then stated the exception, which insists upon a particular account, and excepts to all other accounts, so far as they are inconsistent with the above account. They then turned to that account, and took from the credit side such of the credits there allowed as disputed, viz. *M'Mechen's* and *Wilmer's* claims. The above exception, if, as it is supposed, may be used as evidence against the complainants,

is a distinct admission that the defendants are entitled to those credits, and therefore need not offer proof of them. In addition to this there has been produced repeated settlements of the defendants' accounts with *T. Ringgold*, and admissions by him that they were correct, and that they are entitled to the credits which they now claim. Surely he who created the trusts, declared the purposes for which they were created, and was himself a *cestui que trust*, had a right to examine the accounts of the trustees, and to approve of them. And his admissions ought to be some evidence of the correctness of the payments made by the trustees. If rejected, as claims on the trust fund, because others were interested with him in that fund, they are to be allowed in the settlement of that part of the estate—the *chose in action*, &c. which never constituted any part of the trust estate, but still remained his own, yet to be disposed of as he pleased, and answerable for any debt of whatever description he might admit. On this point they also referred to *Blount vs. Burrows*, 4 *Bro. Ch. Rep.* 75. S. C. 1 *Ves. jr.* 546. *Kirkpatrick vs. Love*, *Ambl.* 589. *Snellgrove vs. Baily*, 3 *Atk.* 214. *Doyle vs. Blake*, 2 *Sch. & Lef.* 243, *Lady Ormond vs. Hutchinson*, 13 *Ves.* 54. *Green vs. Hart*, 1 *Johns. Rep.* 580. *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 93, *(note.)* 1 *Fonbl.* 179.

6. On the *sixth* point. Whether the decree should be enhanced from simple to compound interest? This question has been fully argued on the *third point*. It is settled law that these trustees are not chargeable with any breaches of trust, not charged in the bill. *Smith vs. Smith*, 4 *Johns. Ch. Rep.* 281. It is not charged in either of the bills that there was any delay in paying debts, or in bringing *Maund's* affair to a final decision. *James vs. M'Kernon*, 6 *Johns. Rep.* 543. Where a trustee makes profit, and will not give an account, he is chargeable with compound interest. *Evertson vs. Tappen*, 5 *Johns. Ch. Rep.* 498, 517. Where the deed creating the trust directs an investment of the interest, which is not done, then compound interest is charged. *Raphael vs. Boehm*, 11 *Ves.* 92. S. C. 13 *Ves.* 407, 411. *Darne & Gassaway vs. Catlett*, 6 *Harr. & Johns.* 475. In *Rocke vs. Hart*, 11 *Ves.* 58, the money was used by the executor in the course of his trade; and

yet only equitable rate of interest of 4 per cent. was allowed. In *Young vs. Combe*, 4 *Ves.* 101, there was an express violation of the trust. The executor had the money in hand, and it was his duty to invest. Only 4 per cent. was allowed. In *Newton vs. Bennett*, 1 *Bro. Ch. Rep.* 362, the executor kept the money without accounting, but employed it in his trade. Simple interest only was allowed. The note in that case shows that the only question was as to 4 or 5 per cent. not compound interest. Where gain is made the trustee is to account for the gain, or pay 5 per cent. interest. *Mosley vs. Ward*, 11 *Ves.* 581. The case of *Forbes vs. Ross*, 2 *Bro. Ch. Rep.* 430, was a case of fraud. They also referred to and commented on, *Perkins vs. Baynton*, 1 *Bro. Ch. Rep.* 375. *Treves vs. Townshend*, *Ibid* 384. *Piety vs. Stace*, 4 *Ves.* 620. *Ashburnham vs. Thompson*, 13 *Ves.* 402. *Crackel vs. Bethune*, 1 *Jacob & Walker*, 566. A contract to account for compound interest is void. Where it is allowed, is a relaxation of the general rule. 1 *Ball & Beatty*, 430. *Waring vs. Cunliffe*, 1 *Ves. jr.* 99, *(and note.)* *Ex parte Bevan*, 9 *Ves.* 223. *Connecticut vs. Jackson*, 1 *Johns. Ch. Rep.* 13. *Barrow vs. Rhenelander*, *Ib.* 550. *Van Benschooten vs. Lawson*, 6 *Johns. Ch. Rep.* 313. *Darne & Gassaway vs. Catlett*, 6 *Harr. & Johns.* 475. Compound interest is allowed in certain specified cases of mortgages, &c. *Perkyns vs. Baynton*, 1 *Bro. Ch. Rep.* 574. *Creuze vs. Lowth*, 4 *Bro. Ch. Rep.* 157, 316. *Raphael vs. Boehm*, 13 *Ves.* 590. This last case was an innovation upon the general doctrine. The direction there was to invest the interest to accumulate for the benefit of the trust. *Treves vs. Townshend*, 1 *Cox's Cas.* 50, *(note* 2.) S. C. 1 *Bro. Ch. Rep.* 384. *Tebbs vs. Carpenter*, 1 *Madd. Rep.* 290. *Dornford vs. Dornford*, 12 *Ves.* 127. In the most aggravated cases no compound interest was allowed. *Hall vs. Hallett*, 1 *Cox*, 134. *Crackel vs. Bethune*, 1 *Jac. & Walk.* 566.

The detainer of one trustee does not make his co-trustee answerable for interest, unless the money is placed in the hands of his co-trustee out of the line of the trust, or with knowledge that his co-trustee is not trust-worthy, and who applies the funds, not for the purposes of the trust. Is the case open in this point? Or indeed is compound interest before the court?

The instructions by complainants to the auditor. The auditor's statement was to be made, subject to exceptions. No exception by complainants to the auditor's statement. They are now precluded from excepting. They affirmed the auditor's statement, and now they wish to except. *Wilkes vs. Rogers*, 6 *Johns. Rep.* 566, 591.

[BUCHANAN, Ch. J. Very soon after the constitution of the present court, it was decided that the auditor's report, to which there had been general exceptions, or where there had been special exceptions, or where there had been no exceptions taken to it in the court below, might be excepted to in this court, and the whole accounts gone into.]

7. On the *seventh* point. Although a commission is not allowed, yet a substitution, by way of compensation, is allowed to trustees. *Ellison vs. Airey*, 1 *Ves.* 115. *Brown vs. Litton*, 1 *P. Wms.* 140. *Chetham vs. Audley*, 4 *Ves.* 72, *(and note.)*

8. On the *eighth* point. Although in general a co-plaintiff cannot be examined, yet a co-defendant may be examined in a matter in which he is not concerned. *Brid. Ind.* 659, pl. 2, 5; 660, pl. 12, 13, 14. Here *Tench Ringgold* cannot be interested; for he is defaulter, and the attempt is to charge *Samuel*, who is a creditor to the trust. So that whether *Samuel* is to be prevented from the credit in paying the debt to *M'Mechen*, is of no sort of consequence to *Tench*, as it will neither make him pay more, nor less, if the decree is against him. *Murray vs. Shadwell*, 2 *Ves. & Beames*, 404, 405.

ARCHER, J. delivered the opinion of the Court. This cause is one of great magnitude and interest; of magnitude, in relation to the amount involved in its determination, and of interest, not only on account of the principles connected with its decision, but of the peculiar relations in which the parties concerned stand to each other. On the one side, the complainants are the widow and children of one, whose infirmities and dissipated habits were, early in life, involving in ruin and entanglement a large patrimonial estate, and who gave sure indications that, in a short time, he would reduce to poverty his wife and family. On the other hand, the respondents are the uncles of the com-

plainants, who, observing the unfortunate habits of their brother, generously stepped in between him and his tottering fortune, and took upon themselves the onerous duties of trustees of his estate. After a period of twenty-four years, they are presenting to this tribunal an account of their stewardship, which has been demanded by the widow and children of their brother.

After a laborious discussion of the very eminent counsel concerned for the parties, we have approached the examination of the multifarious and perplexed transactions which have grown out of a trust of such duration, with an anxious solicitude to arrive at truth, and by applying the law to ascertained facts, to reach the justice of the case. Courts have very frequently painful duties to perform; and although they cannot be blind to the consequences which may flow to individuals from their decrees, yet insensibility to them is a stern mandate of judicial duty.

We do not deem it necessary for the purpose of this decree, to recapitulate the proceedings and numerous facts in the record; they will, perhaps, be found to be sufficiently stated in the auditor's report and in the chancellor's decree. The cross appeals will, for the purpose of this opinion, be considered as consolidated; and we shall proceed to present our views of the various questions which have been raised in the discussion by the counsel on either side.

The court conceive that the trustees are accountable for the value of *Hopewell*. In the view which we take of this subject, so far at least as concerns this question, it is immaterial to inquire, whether the transfer of this estate was made under the deed of 1798, or of 1807; for, in either view, they were not authorised to transfer that estate except by a sale. If it were considered as coming under the provisions of the deed of December 1807, its terms are too explicit to need illustration. As it regards the deed of 1798, they were authorised to sell the whole or a part of the real estate on credit, or for cash, and the surplus, whether consisting of real estate, bonds or money, was to be applied as is therein directed. It has been contended, that the trustees under this deed had authority to make the exchange of *Hopewell* for the *Ferry property* on the *Susquehanna*, because the deed contemplates a surplus of land re-

maining on hand after the objects of the deed are gratified. The trustees might, in their discretion, only sell a part of the real estate, and the part in that event remaining in their hands, would have been a *surplus* over and above what was necessary to effectuate the objects of the trust. The argument would have been entitled to more weight, had the direction been to sell the whole estate. The sale of *Hopewell*, was not only a violation of the express stipulations of the trust, but was known and acknowledged to be so by the respondents. The deed for the ferries, from *Richard S. Thomas*, was given to them in their individual characters, and not as trustees, and the reason for this procedure, as is deducible from the complainants' *exhibit B*, is, that they had no right, by the terms of the trust, to take the ferries in exchange. In this transaction they *both co-operated*, and although they may have acted with the best intentions, and with the most honourable views towards their *cestui que trusts*, this court must hold them jointly responsible, unless by the various acts of sanction which have been given by *Thomas Ringgold*, they shall appear to have been justified. Apprehending, indeed, responsibility growing out of this transaction, the trustees, if they did not seek indemnity for this contract, accepted a bond from *Thomas Ringgold* reciting his original assent to the exchange, and binding himself to save them harmless; and on the same day on which the bond was executed, as if the more surely to guard them from anticipated responsibility, he made his last will and testament, in which, as far as he could, he attempted a ratification of this transaction. This instrument, although its expressions are general, has an undoubted allusion to this contract alone, for no other sales of real estate are alleged to have been made, which needed ratification. These instruments were executed nearly four years after the execution of the deed of December 1807, by which he transferred all his land, negroes, stock and farming utensils to the trustees. His habits of inebriety are represented by the testimony before us to have been confirmed, and to have greatly debased and debilitated his mind. He was either placed, or believed himself to be placed, in a condition of the most abject dependence on his brothers, for even the most common necessaries of life. He had clear and unquestionable rights,

as one of the *cestui que trusts* under the different deeds of trust, which secured to him in all probability, an ample independence. Yet, instead of manifesting any desire to enforce those rights, as his necessities might require, his letters rather represent him in the condition of a pennyless dependant on their charity and bounty. The relation existing between a trustee and *cestui que trust*, the policy of the law requires, should be guarded with vigilance by a court of equity—contracts between them should be scrutinised, that no injustice should be done the *cestui que trusts*. It is true, these various acts of attempted indemnity do not, in relation to the transactions to which they have reference, or from their character as manifested on the face of them, bear any striking evidence of legal inefficiency. It might not have been inconsistent with those great principles of moral duty, or just liberality, which one brother might owe to another, to grant indemnity for acts, which, though injurious in their consequences, he might have believed proceeded from the purest motives. But a court of equity ought to be perfectly satisfied, that he was free to act as a rational intelligent man, that he was not governed by considerations growing out of a dependant condition; and in this case there is too much reason to believe, not only from his letters, but from his general character and conduct, as detailed by the testimony, that the considerations above alluded to, entered largely into the motives for executing these instruments.

The responsibility of the respondents growing out of this contract, having been determined, it is necessary to ascertain the price with which they should be charged. The *cestui que trusts* are entitled, upon every principle of equity, to the full value of the lands at the time of the sale. The trust has been violated, the title to the lands disposed of contrary to the express injunction of the instrument under which they act, and there is no possible means by which this court can reinstate the complainants in their interest, but by charging the trustees with the utmost value of the property. This is the principle adopted in the case of a mixture or confusion of property, and the ground of it is, that although the trustee may be injured by its application, yet the *cestui que trusts* are certain of indemnity; and it would be but just, that if, in the impossibility growing

out of the conduct of the trustee of ascertaining the actual value, injury should probably result, it should rather fall on him whose conduct had been delinquent, than on the innocent *cestui que trusts*. Yet, *where the value of the property can be clearly ascertained, that must be the measure of indemnity*. But for the circumstances which preceded and followed this sale, we should have been compelled to fix the value of these lands, from the opinions and recollections of witnesses, of the state and condition of the property, and what it would have sold for in 1807, and for this purpose, the depositions of *Mr. Thomas*, *Mr. Worrell* and *Mr. Barroll*, would have been sufficient; but the record furnishes us with the evidence that these lands were advertised for sale; that the sale was attended by many persons of property; that the lands were examined by several who were considered as desirous of purchasing, and who were able to have become the purchasers: yet, that when it was set up, a greater price could not be obtained than $16 per acre, and that the trustees bought it in for the estate, at that sum, and afterwards actually agreed to sell it to *R. S. Thomas* for that price, and even he refused to execute his contract. These facts furnish the best evidence, that the lands did not exceed the value of $16, and greatly outweigh the opinions of witnesses, as to its value, given many years after it was thus publicly offered. If the land had been more valuable, it would surely have been bid for at a greater sum, when it was thus offered under such favourable circumstances. Nothing can be deduced of the value of *Hopewell*, from the price which was fixed on it in the deed from the trustees to *R. S. Thomas*—this was done in consideration of the exchange—*Thomas*, whose experience made him better acquainted with the ferries, was anxious to dispose of them, and probably anticipated some of the losses and inconveniencies which subsequently attended them; although he was unwilling to give $16 an acre for *Hopewell* in cash, yet, if the ferries were taken in part, he was willing to give a much greater sum. This only shows his anxiety to rid himself of the ferries, and not that *Hopewell* was, even in his estimation, worth more. The court, therefore, think the chancellor erred in charging the value of *Hopewell* and *Chester-Town* property at $25,000.

The amount due from *Tench Ringgold* for the sale of the

332½ acres of the *Washington* lands, has been also one of the subjects of controversy. It has been contended by the respondents, that these lands were sold by *Thomas Ringgold* before the execution of the deed of trust of October 22d, 1798, and that having been so sold, they were not conveyed, or intended to be transferred by that instrument, and were not a part of the trust property; and this is emphatically stated in the answers of the respondents; and in the letters of General *Ringgold* to Mr. *Brice*, exhibited by the complainants, he regrets it as a misfortune, that the lands were sold by *Thomas* before the deed of trust was thought of; and it is said that one of the complainants, *James G. Ringgold*, acting for himself, and as agent and solicitor for the other complainants, has admitted the fact. But whatever may be the strength of this testimony, it is not warranted by the exhibits and evidence in the cause. By *exhibit S. R.* No. 1, *Samuel Ringgold* charges himself as trustee with the receipt of part of the purchase money of these lands; this account constitutes a part of the answer, as much so as any express averment in it; and in *Tench Ringgold's* exhibit, which also constitutes a part of his answer, it is said, that on the 21st of November, 1798, a settlement took place between *Tench* and *Thomas*, and assented to by *Samuel*, by which it appears that *Thomas Ringgold* is charged with the legacy due *Tench*, with interest up to the 6th of March, 1799, which shows, that until that period the legacy was unsatisfied, as it could not have been if a sale had taken place before the deed of trust. These inferences and facts are strongly supported too by the evidence furnished by the deed of October, 1798, itself; that declares on its face the indebtedness of *Thomas* to *Tench*, and one of the first objects of the trust there created, is the satisfaction of the legacies due from *Thomas* under his father's will, (the legacy to *Tench* being one) by the sale of the lands. This instrument does, therefore, entirely negative the idea that a sale of these lands was made before the execution of that deed. But if *Thomas* had agreed to sell the lands to *Tench*, the legal estate in the *Washington* lands, with the amount due thereon, passed to the trustees, and it was unquestionably the duty of *Samuel* to collect the purchase money and convey the property. The

deed of the 27th of May, 1799, from *Thomas* and *Mary Ringgold* to *Samuel* and *Tench Ringgold*, instead of impugning the idea of a sale by the trustees, is calculated to confirm it. If the *Washington* lands were not trust property, and did not pass by the deed of 1798, why was this deed executed to *Tench* and *Samuel?* Would he not have been more likely to have himself coerced the payment from *Tench*, and conveyed it to him, had he personally sold it to *Tench*, and retained the title? Instead of this, he joins his wife in a conveyance to *Samuel* and *Tench*, which is in entire inconsistency with the idea of a previous sale by him. The object of this deed was undoubtedly to pass to the trustees the dower of Mrs. *Ringgold*, that *Samuel* might be enabled to give an unincumbered title to *Tench*, when the purchase money should have been paid by him to *Samuel*. In any light in which this transaction can be viewed, a joint responsibility grows out of it. If the estate passed by the deed of 1798, there was a breach of trust in *Samuel* in selling to his co-trustee, which would make him responsible; and if contracted for by *Thomas* with *Tench*, before the execution of that instrument, it still passed the legal estate to the trustees, and it was *Samuel's* duty to have collected it; and having not only failed to do so, but having made no effort for this purpose at any period of the existence of the trust, but suffered it to lie in his hands when he knew the trust was abused, in consequence of a failure on *Tench's* part to apply the amount of this purchase money to the payment of the debts of *Thomas Ringgold*, he has clearly made himself responsible equally with his co-trustee.

The joint responsibility of the respondents for the sale of the personal property in November, 1807, on the *eastern shore*, is a question which has also been submitted to the consideration of the court. The bill charges the trusts under the deeds of 1798 and 1807, and the answers of the defendants admit the trusts confided to them; and in their various exhibits, which are made parts of their answers, they return accounts of their sales of the personal property as made under these deeds. It seems to have been considered by the trustees, as far as the evidence in the cause will enable this court to judge, that the trustees conceived they had power, under the deed of 1807, to sell the per-

sonal property which was disposed of by them, from *Huntingfield* and *Hopewell.* But it is very clear, that a deed made on the 18th of December, 1807, could transfer no right to property which they had sold on the 27th of the November preceding. *Thomas Ringgold*, at that period, had no interest to convey. *Samuel* and *Tench* had sold it all previously to various purchasers, in his presence, or with his express approbation, at a time, too, when he had, for aught that appears in the cause, a complete right to it; for by the deed of 1798, no personal property was conveyed, and we cannot notice the deed of January 1807, as it is not evidence in any manner in this cause. It is very probable that these sales were all made in anticipation of the deed of December, 1807, which was to follow, and did follow a few days after the sales. That *Samuel* and *Tench* were trustees of this property, must be inferred from all the evidence. They exercised dominion over it; they sold it with the assent of *Thomas;* they took bonds from the purchasers in their own names; they collected a part of the purchase money, and they have proffered themselves ready to account for these sales, and have made a return thereof as having been made by them as trustees. These sales not being then within either deed of trust, must have been made under some conventional arrangement, either verbal or written, which is not before the court, and which is only to be inferred from the transactions of the parties. That such a trust may be asserted and enforced in a court of equity, cannot be questioned. But the difficulty on the part of the complainants, arises from the circumstance, that there is no allegation in the bill which covers or affects any other trusts than those of October, 1798, and of December, 1807. A court cannot be aided in the construction of any agreement by the acts which the parties may have done under it, nor is a party bound by any construction which he may have put upon the instrument. The answer, therefore, which presents a list of the negroes and specific articles of personal property sold on the *eastern shore*, also discloses the fact that the sales were made anterior to its execution, and the evidence confirms the answer in this respect. Had these sales been actually made in anticipation of the deed of 1807, and resting on the agreement of the parties that they should be confirmed by that

instrument, and that their responsibility for the proceeds of these sales should be governed by its stipulations, which we have no doubt from the evidence was the fact; had some verbal or other trust existed under which they were made, or had *Samuel* exercised dominion over the property after the execution of the deed of January, 1807, and proceeded to sell the property as trustee in virtue of its stipulations, as if it had been a valid and operative transfer, and had under these circumstances joined *Tench* with him as agent, or associated him as a co-trustee with the assent of the parties, in anticipation of a deed of trust subsequently to be executed, it was surely important that each or all of these facts, as the truth might warrant, should have formed substantive allegations in the bill; or if either fraud or mistake had given the deed of December, 1807, the shape which it now assumes, contrary to the understanding and agreement of the parties, that should also have been averred. A court of equity must always decree upon the allegations of the complainants. It is never justified in going beyond them. Such a course would violate the fundamental principles of pleading, and would work a surprize on the respondents. Had the respondents admitted a sale under these deeds, without disclosing the fact of the anterior sales, it might be well questioned whether what had been thus in pleading explicitly admitted, could be contradicted by the adduction of evidence on their part, showing that the sales were anterior to the deed. But having averred the sales previous to the deed, although they state that the sales have been made by them as trustees, they are not estopped and precluded from demanding whether a legal responsibility grows out of the deeds of trust for sales previously made by any just construction thereof. We are therefore of opinion, that in this cause, whatever under other circumstances might be the right of the complainants' demands against the respondents as trustees for sales of the personal property on the *eastern shore*, this court, in the state of these proceedings, cannot decree against them for the amount of those sales. In this respect, the rights of the parties are reserved for the future consideration of a court of equity, should the complainants deem that their interest demands an investigation.

But although the sales of the personal property cannot be covered by any allegations in the bill, this court, in this proceeding, will do equity between the parties as far as is consistent with the established principles of chancery proceedings. It appears from the evidence in the cause as furnished by the answers of the defendants, (see their various accounts filed as exhibits to their answers,) that *Samuel Ringgold* has received the sum of $1,117 83, part of these sales, and that *Tench Ringgold* has received the residue from the different purchasers. *Samuel Ringgold* has applied the sum thus received to debts of the estate, and *Tench Ringgold* has paid debts and made disbursements to a considerable amount after the sales of the personal property. We shall therefore consider, so far as *Tench* has, *after the sales of the personal property*, paid debts and made disbursements for the estate of *Thomas*, that they were made from such receipts. For all the residue of *Tench's* receipts, which will be unexhausted by such an application, and for the amount of his own purchases at the sales of 1807, all of which remains uncollected, accountability must be sought by the complainants in a new proceeding. We conceive from the evidence in the cause, that although these sales were not within the terms of the trust of 1807, charged in the bill, yet they were in their hands as trustees for the payment of debts, as well as the property actually passing by that conveyance, and being so, and their accounts showing generally that debts were paid without designating out of what trust fund particularly they were paid, that for the purpose of effectuating justice between the parties, we have a right to consider that the debts and disbursements after the sales of 1807, were paid by each trustee to the amount of actual receipts by each from these sales, out of the money received by them from such sources.

We consider the respondents as properly chargeable for the amount received from *Thomas Ringgold's* securities. These securities amounting to the sum of $8,191 47 were received in the years 1799, 1800, 1801, 1803, and 1805, as appears by the accounts exhibited and receipts offered in evidence. The complainants allege, that at the time of the execution of the deed of trust of 1798, authority was given by *Thomas Ringgold* to the respondents, to collect all debts due to him, (to be

applied to the payment of his debts, and that in virtue of such authority, large sums of money were received by them) and they pray an account thereof. This allegation is not directly answered, otherwise than by their exhibited accounts, and by testimony from which it appears, that outstanding debts at that time, due to a large amount, were by them collected as trustees. These facts justify us in saying that such authority was given, and that they acted in regard to them as joint trustees.

These respondents are also chargeable with the rents received for the lands of *Thomas Ringgold.* The legal estate passed in these estates to the trustees by the deed of 1798. They were rented out and the rents received, and should have been applied to the purposes of the trust.

The subject of interest forms a very important item in the controversies between the parties—the respondents insisting that interest ought not to be charged against them, while the complainants contend, that they should be allowed compound interest, or if not, that the chancellor has erred in allowing a rest of six months from the receipt of monies by the trustees free of interest.

As it regards the balance due from *Tench* for the *Washington* lands, there can be no pretence for exemption from interest; he was to pay for them at a stipulated period and has failed to do so; and it having been determined that there is a joint responsibility for the principal, there is, of course, a joint responsibility for the interest.

As it regards the receipts of *Tench* between the execution of the two deeds of trust, which were not applied by him to the payment of debts, it may be remarked that it was his duty to apply them to such outstanding claims as were then due from the *cestui que trust,* or if he had detained them, to have met the outstanding judgment of *J. J. Maund,* to have placed those monies in a situation where they could never have met with those accidents to which every individual's fortune may be liable. He should at least have shown us, that the funds were kept separated from the mass of his estate. Could this have been done, this court would have been disposed to shew the utmost indulgence. The pressing character of the outstanding debts, could not but be known during this period of *Samuel,*

for he was, during the most of this time, advancing from his private estate to meet them; yet he makes no effort to obtain the funds in *Tench's* hands to be applied to these objects. He must have known that *Tench* had funds; for he was permitted to collect debts on the *eastern shore*, and if he did not know, he was surely bound to know and to watch over the conduct of his co-trustee. Upon such sums, they must be conjointly charged with interest.

For the amount due from them on account of the *Hopewell estate*, they are certainly chargeable with interest. That they invested it in property unproductive, can furnish no ground for exemption, because they acknowledgedly transcended their power and violated their legal duties and obligations. We must consider them as having the value of this estate in hand at the time of the sale; and the reason assigned for the previous liability, will apply to them in this particular, if the sales were even made under the deed of 1798, where the obligations of the trustees to pay interest is not so entirely clear and apparent as under the deed of 1807. But the sale may and ought to be considered as made under the latter deed. It is true, the contract of sale was made before, but they derived their power and authority to perfect it under the deed of 1807, for that conferred the power to pass it free from the incumbrance of *Mary Ringgold's* dower; and the title of *R. S. Thomas*, was in fact, made and perfected after and under that instrument, the conveyance to *R. S. Thomas*, having been made in 1808. Now, what are the stipulations of the deed of December 1807, so far as they relate to the present question? "That the *whole estate* thereby conveyed, should be immediately sold, and after paying all the just debts of *Thomas Ringgold*, the proceeds should, as received, be invested in government, bank, or turnpike stock, and the interest or dividends to be paid in the proportions therein mentioned; part to Mrs. *Ringgold* during the joint lives of herself and *Thomas;* part to *Thomas* during his life, and part to be applied to the support and education of the children of *Thomas* and *Mary*, *yearly* and half-yearly, as the same may be received; and that, until the proceeds of the sale shall be invested in stock, the *interest* arising therefrom, shall be paid and applied, when and as it is received in the proportions therein designated,

to the *cestui que trusts.*" Having the proceeds of this estate in hand, it was their imperative duty to have invested unless a portion, or the whole of them, had been demanded by acknowledged debts of *Thomas Ringgold.* The deed was intended as a family provision, and the debts then outstanding, except *Maund's* judgment, were inconsiderable. By transferring the legal estate to the trustees in all this property they placed their dependence upon its productiveness in their hands for a support. They parted with the income which it furnished in consideration, and evidently under the expectation, that it would be immediately invested. It had been represented nearly a year prior by one of the trustees, that the estate was nearly disencumbered of debts, and hopes were entertained that *Maund's* claim, which was then depending in court, would be perpetually enjoined. It had been litigated at that period for several years and no reasonable expectation could then be entertained that it would be very speedily brought to a close. Under these circumstances, would the trustees have been justified in laying by the money and patiently waiting for the event of a protracted chancery suit; the debt daily growing larger by accumulating interest, the funds remaining idle and stationary, and the family suffering for want of the means of subsistence, depending on the charity of their relatives? It never could have been the intention of the parties, that the investment in stocks should await the determination of *J. J. Maund's* judgment; or that the family should for a moment be left without support, for the interest on the sales are directed to be paid them until the funds are invested; thus, looking to a constantly accruing interest, and negativing every idea of any intended permission, that they should lie idle for such a purpose. Had the money then remained in their hands, they would have been grossly negligent in not investing it. In such a case the rule is settled, that trustees are chargeable with interest. *Treves vs. Townshend,* 1 *Brown's Ch. Rep.* 384. *Rock vs. Hart,* 11 *Ves.* 58; and the rule, Chancellor *Kent* declares to be founded in justice and good policy, as tending both to prevent abuse and indemnify against negligence. *Dunscomb vs. Dunscomb,* 1 *Johns. Cha. Rep.* 504, 508.

Where the trustee is directed to invest funds and to reinvest

the dividends, or interest, or in other words, where the trust directs an accumulation, and the trustee has used the funds, compound interest will be allowed, as was done in the case of *Raphael vs. Boehm*, 11 *Ves.* 92, 108, 109; and S. C. 13 *Ves.* 407, 590; or where he has used the trust money, or employed it in his trade or business, he shall also be charged in the same manner as was decreed in *Schieffelin vs. Stewart, and others*, 1 *Johns. Cha. Rep.* 620. The grounds of this allowance, as is apparent from these cases, is founded on the gain or presumed gain of the trustees, and that the *cestui que trust*, may be indemnified by the efforts of the court in this way, to reach their profits or presumed profits. But, in this case, although the *cestui que trusts* could not, perhaps, be indemnified by a less allowance than compound interest, yet the circumstances forbid the presumption of a gain on the part of the trustees; although the investment was in violation of the trust, it was done doubtlessly with the best intentions; with no views whatever, of reaping from the transaction, any benefit to themselves, but declaring that the profits, whatever they might be, if any, should be for the benefit of the trust estate. Believing such to have been their motives and views, public policy forbids that courts of justice should pursue a course which would have a tendency to deter persons from accepting offices frequently so necessary for mankind.

The trustees have been allowed on the authority of the case of *Dunscomb vs. Dunscomb*, 1 *Johns. Cha. Rep.* 510, a rest of six months without interest on their receipts. This is allowed as a reasonable time within which to pay or invest the funds. There would be great reason in the rule, had they actually invested or made efforts to invest; but in this case no dispositions were ever manifested to make such an application of the money as the trust contemplated. Debts due from the estate, were in many instances accumulating interest with the addition of costs, while funds were suffered to lie idle in the hands of one of the trustees, or were diverted to objects of expenditure foreign to the trust. To allow this rest, would in our opinion be doing injustice to the *cestui que trusts*.

Part of the account of *Simon Wilmer*, together with many other charges against the estate, were allowed by the auditor in

his accounts, and sanctioned by the Chancellor's decree, for which no vouchers were produced, and these allowances have been made the respondents from the statement in their answers alone, by which they represent these disbursements to have been made. The general rule that an answer responsive to a bill, is evidence for a respondent, is a well established and settled principle. But, the answer of a defendant, where it asserts a right affirmatively in opposition to the plaintiff's demand, is not evidence. *Beckwith vs. Butler*, 1 *Wash.* 224. *Payne vs. Coles*, 1 *Munford*, 373. An answer will not support a matter set up in avoidance or discharge where the matter of avoidance is a distinct fact. In such case, the defence must be proved. Mr. *Evans* in his appendix to *Pothier on Obligations*, 157, lays down the following principle: That where the answer is replied to, the whole is put in issue, and the defendant must support by proof, all the facts upon which he means to insist, while the complainant may rely upon *every fact admitted*, which he conceives to be material, without being bound *to the admission of others;* and this rule he deduces from a case cited in *Gilbert*, 51, which, as it is a leading case, it will be necessary to notice. There, the defendant, by his answer, which was put in issue by the complainant's replication, admitted as executor, that the testator had left £1100, and said, that afterwards, the testator gave a bond for £1000, and the testator gave him the other £100; as there was no evidence but the defendant's admission for the receipt, it was contended that he ought to find credit when he swears to his own discharge; but it was resolved by the court, that when an answer was put in issue, what was *confessed and admitted need not be proved*, but that it behoved the defendant to make out, by proof, what was insisted upon by way of avoidance. Chancellor *Kent* declares that this rule is well settled in chancery proceedings, and recognizes and adopts it in the case of *Hart vs. Ten Eyck*, 2 *Johns. Ch. Rep.* 62, where all the learning on this subject is ably collected and reviewed, and where it was determined that on a bill to account, the answer is no evidence of disbursements. The cases above cited from *Washington* and *Munford's Reports*, were also bills in chancery against executors to account, and where discharges alleged in the answers were held

to be of no avail unless supported by proof. The doctrine may then be considered as settled, that on a general bill to account, the answer is no evidence of disbursements, notwithstanding it is said that the Court of Errors of the State of *New-York*, overruled on appeal the judgment of Chancellor *Kent* on this question. 7 *Johns. Ch. Rep. General Index*, tit. *Evidence*, 75, pl. 11. That tribunal, from its peculiar structure, does not appear to be calculated for legal investigation, and its judgments cannot outweigh the opinion of Chancellor *Kent*, fortified as it is, by numerous cases of established authority. But, it is said, there being a call here for the amount of disbursements, and debts paid, that this case is varied from those which have been cited. It is true, there is, from aught that appears, a variance in form, but there is none in substance. For, a prayer that the defendant shall account, is in effect a call on the defendant, to state in his answer, not only his receipts, but his disbursements, so that the complainants may have an opportunity of putting them in issue; and without which, indeed, the defendant himself could give no evidence of them. Nothing more is demanded in the interrogatories in this bill, than, under a general call to account, the defendant would have been obliged to answer. It is nothing more in either case, than a demand on the defendant to show his receipts and the legal evidences of his expenditures, in conformity with the trust. Nor is there any hardship in the rule. Men of ordinary care preserve the evidences of their payments, and to say that the respondents should have done it, is demanding from them nothing extraordinary or out of the usual course of human transactions.

The establishment of a contrary doctrine would lead to dangerous consequences, and would be calculated to render trusts valueless, by giving to trustees, executors and guardians, the power on their own oaths, to exempt themselves from all responsibility. The rule then may be stated, (and it is the good sense of all the cases cited in the argument,) that in all cases where a complainant seeks a discovery and relief, and to make out his case, applies himself to the conscience of the defendant, if, in his answer, the liability is once admitted, there can be no escape from it but by proof. It is true, every thing which he says, with regard to the creation of that liability, must be taken

together; detached sentences cannot be used against him, but every thing which he says, relative to his original liability, is properly in evidence. This doctrine will be found to be supported in *Lady Ormond vs. Hutchinson*, 13 *Ves.* 53, 54, and by the cases above referred to.

The complainants, by their supplemental bill, seek to make the respondents accountable for nine negroes, taken by *Samuel Ringgold*, at the stipulated price of $2000. The answer of *Samuel* admits that they were so taken, but denies accountability, as they were taken at a valuation, in part payment of large sums of money, paid and advanced by the respondent, to *Thomas Ringgold*, and that a balance is still due him, of upwards of $3500. *Samuel Ringgold*, in *Exhibit* No. 1, filed with his answer to the original bill, has charged *Thomas Ringgold* with the payment to *D.* and *W. M'Mechen* of the sum $3574.

The court are of opinion, that the respondents cannot be charged with the valuation of these negroes. It is in evidence, that *Thomas Ringgold* admitted, that they were taken in part satisfaction of a debt, due from him to *Samuel*, in the year 1806; at a time, when from aught that appears in evidence, he was exercising dominion over his personal estate, and when no deed of trust, which the court in this cause can notice, covered it. As it regards the sum of $3574, which *Samuel Ringgold* claims credit for, the court deem it unnecessary, in pronouncing their judgment, to recapitulate the testimony of the various witnesses, who have been examined on the subject. Nor do they deem it necessary to determine the question, as to the competency of *Tench Ringgold's* testimony, for it is considered, that there is enough in the record without it, to justify the allowance.

It is contended, that this court is not competent to allow commissions, as a compensation to the trustees for their trouble. In *England*, a liberal indemnity is allowed to trustees for their expenses, but nothing as a compensation, unless founded in positive agreement between the parties. This rule appears to be applicable, not only to trustees of every description, but to executors. They are considered as confidential offices, gratuitously undertaken from motives of friendship or humanity, and

without views of personal benefit or profit. Yet, the *English* courts grant *per diem* allowances, not in the nature of a *compensation*, but under the name of an *indemnity*. The difference then, in truth, is only in the mode of allowance, not in the principle. It is in fact, a mere difference in name. Commissions in a case like this, might very fairly be considered as only extending a just and reasonable indemnity for time bestowed in the management of the concerns of others. But if, indeed, there was a difference in principle, this court would feel themselves justified in granting reasonable commissions. Our statutes allow commissions to executors, administrators, guardians and trustees, under judicial sales, and by analogy to these statutes, or by an equitable construction of them, the allowance may, and ought to be made in this case. But, although the general claim to commissions is admissible, we conceive that none should be allowed for the sale of *Prospect Hill*. The trustees have paid *N. Brice*, their agent, the only commissions to which they were entitled on this sale.

By the will of *Mary Ringgold*, bearing date in October 1803, certain legacies were bequeathed to *Samuel* and *Tench Ringgold*, in trust for *Thomas Ringgold;* with these legacies the respondents have charged themselves in their account accompanying their answers, but have, at the same time, referred to the source from which they emanate. There is no allegation in the bill of complainant or supplemental bill, which reaches this trust, and they cannot in this proceeding, be charged with them, either jointly or severally, but the equity of the complainants, in respect thereof, is reserved.

The court have appointed an auditor for the purpose of stating an account between the parties, upon the principles contained in this opinion, and will direct, that his costs shall be taxed in this proceeding. From the account thus audited, it appears that the sum of $39,318 54, with interest on the sum of $28,576 87, part thereof, from the 1st of July 1822, is due from the respondents to the complainants, which will be decreed to be paid into the court of chancery, to be distributed or invested under the authority thereof, according to the rights of the respective complainants.

We concur with the chancellor in awarding costs to the com-

plainants, and are of opinion, as the decree of that court will be entirely reformed, that each party pay their own costs in this court.

BUCHANAN, Ch. J. dissented.

*Decreed*, That the decree of the court of chancery given and rendered in these causes, be reversed, except as to the amount and sum of money, hereby decreed to be payable to the appellees in the first and the appellants in the second of these causes. And this court proceeding to pronounce such decree in the premises, as the court of chancery ought to have pronounced, *Decreed* also, that there is due from the appellants in the first and appellees in the second of these causes, and that they do pay to the appellees in the first and appellants in the second of these causes, in the manner hereinafter mentioned, the sum of $39,318 54, with interest on the sum of $28,576 87, part thereof, from the 1st day of July 1822, the said sum, with interest, having been ascertained by and agreeably to the accounts hereto annexed.

*Decreed* also, that the parties in the said causes, pay their respective costs incurred by them in this court on their appeals, but that the appellants in the first and appellees in the second of these causes, pay to the appellees in the first and the appellants in the second thereof, the costs incurred by the said appellees in the first and appellants in the second of said causes, in the court of chancery.

*Decreed* also, that the chancellor make and pass all necessary orders for carrying this decree into full and complete effect, by ordering and directing, that the said sum of money, with interest as aforesaid, and the costs as aforesaid, incurred in the court of chancery, be brought into the said court of chancery, by the appellants in the first and appellees in the second of these causes, to be distributed and paid, under the directions of the chancellor, to the said appellees in the first and appellants in the second of said causes, according to their respective rights and interests; and also, that the chancellor order and direct, that the said appellees in the first and appellants in the second of said causes, pay to the auditor of the court of chancery the sum of $23 33, allowed by this court to the auditor, for his fees in

auditing and stating the accounts directed by this court to be made between the parties.

*Decreed* also, that all the equity and equitable rights and claim of the said appellees in the first and appellants in the second of said causes, be, and the same is hereby reserved and maintained to them, against the said *Samuel Ringgold* and *Tench Ringgold*, or either of them, as to all or any personal estate, of the late *Thomas Ringgold*, or the proceeds of sales or dispositions thereof, of any kind, and interest on such proceeds, except as to so much of such personal estate and proceeds, as has by the accounts hereto annexed, and by this decree, been applied to or in reference to the payments and disbursements, by the said *Samuel* and *Tench*, or either of them; and also, that the like equity be reserved and maintained to the said appellees in the first and appellants in the second of said causes, against the said *Samuel Ringgold* and *Tench Ringgold*, or each or either of them, as to any legacies bequeathed, to or for the benefit of the said *Thomas Ringgold*, by the last will and testament of his mother, *Mary Ringgold*.

DECREE REVERSED, &c.

## BOURNE *vs.* MACKALL.—June, 1826.

**Where a record had not been transmitted to the appellate court under a writ of error, that court will lay a rule on the plaintiff in error, and clerk of the court to which the writ was directed, to show cause, &c. On the record being filed, the court will, if it be the regular term for judgment, and no counsel appearing for the plaintiff in error, dismiss the writ.**

BOYLE for the defendant in error, had moved the court, on a former day during this term, to docket this action, and dismiss the writ of error sued out by the plaintiff in error—no record of the proceedings intended to be removed having been transmitted to this court. He filed in court the certificates of the register of the court of chancery, and clerk of *Calvert* county court, showing that a writ of error had been issued on the 20th of December 1824, commanding that a record of the proceedings on a judgment rendered in *Calvert* county court, at October term 1824, in favour of the defendant in error against the

plaintiff in error, be transmitted to this court; and that the said writ of error had been produced to the said county court. He observed that the condition of the writ of error bond, prescribed by the act of 1713, *ch.* 4, is that the plaintiff in error shall prosecute his writ of error to the next court of appeals, and these words impose upon him the obligation of producing to the court of error, a proper transcript of the record, and if he fail to do so in due time, the condition of the bond is broken, and the defendant ought to be permitted to docket the case, and have the judgment affirmed, or a dismissal of the writ of error. The defendant in error cannot proceed upon his judgment in the court below, because it is stayed by writ of error as a supersedeas, and to commence a new action upon the writ of error bond would create unnecessary and vexatious delay. This is a new case in this court, and it is not of much importance what the practice is, so that it be settled and known. In the supreme court of the *United States* the practice is, in all cases where a writ of error, or an appeal, shall be to that court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it is made the duty of the plaintiff in error, or appellant, to docket the cause, and file the record thereof with the clerk of that court within the first six days of the term, and on failure to do which the defendant in error, or appellee, may docket the cause, and file a copy of the record with the clerk, and the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term; or at his option, he may have the cause docketted and dismissed upon producing a certificate from the clerk of the court, wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed. *Randolph vs. Barbour*, 6 *Wheat.* 128. 19th *Rule of the Supreme Court of the United States*, 1 *Wheat.* XVI, and the 32d rule of the same court, 6 *Wheat.* VI.

The Court then ruled, that the plaintiff in error, and the clerk of *Calvert* county court, show cause, on or before, &c. (a day during the term,) why a transcript of the record of proceedings in this case had not been returned to and filed in this court, according to the command contained in the writ of error.

A copy of this rule was served on the plaintiff in error, and on the clerk of *Calvert* county court, and a transcript of the record of proceedings was filed in this court *(a)*.

*Boyle* now moved the court to affirm the judgment, or dismiss the writ of error. He stated that it appeared by the transcript of the record filed, that the writ of error was made returnable to the last June term of this court, and that this was the regular term for affirming the judgment, it not being a case for argument; and no counsel appearing for the plaintiff in error,

WRIT OF ERROR DISMISSED.

*(a)* The clerk had, as he stated, in due time forwarded a transcript of the record by the mail.

## HURTT *vs.* FISHER.—June, 1827.

An executor empowered to sell lands by last will, having sold them in 1814, and put the purchaser in possession, it was his duty, if the sale was for *cash*, payment being refused, to have sued; if on *credit*, he ought, within a reasonable time, to have obtained bond and security for the purchase money; and at all events should have retained possession of the land until the necessary security was given. Omitting to sue at law until 1819, he was *prima facie* guilty of gross negligence, and responsible, as a a trustee would be, for the proceeds of the land from the time of the sale, deducting his reasonable expenses and commission.

A trustee, with power to sell, and having sold lands, being informed that a deed was required by a purchaser, to whom he had sold and given possession, and that the purchase money would be paid when the deed was executed, doubting his right to execute a deed, yet not obtaining a decree, ratifying his sale for 4 years, is bound to show the circumstances beyond his control, to justify this delay.

A trustee is responsible for money lost by his gross negligence.

Lands devised to be sold are thereby turned into money, and considered in equity as personal estate. A wife being entitled to the proceeds of such land, dying after a sale of it, her husband surviving, is entitled to the proceeds thereof.

APPEAL from *Kent* County Court, sitting as a Court of Equity. The bill filed by the appellee on the 13th of March 1823, stated that in the year 1814 *James Hurtt* died seized and possessed of a considerable real and personal estate, leaving nine children, viz. *Mary*, *Henry*, *Samuel*, *Elizabeth*, *Adah*, *Martha*, *James*, *Sarah* and *Ruelma*, the three last minors, under the age of 21 years. That the said *Hurtt* by his last

will, dated the 26th of January 1813, directed that all his lands in *Queen-Anne's* and *Kent* counties should be sold under the direction of his executor therein named, and upon such terms as might be most to the benefit of his estate, and the sales thereof to be accounted for by his executor as part of his estate; and also that certain parts of his personal estate should be sold and accounted for by his executor as part of his estate; and that all his children should be equally entitled to his estate, both from the sales of his land, and his personal property of every kind. And by his said will he constituted and appointed his son *Henry Hurtt*, (the appellant,) executor thereof, who took upon himself the execution of the said will. That on or about the 26th of August 1814, *Henry Hurtt* sold to *James Salisbury* the land situate in *Kent* county, of which the testator died seized, for the sum of $14 50 per acre, amounting in the whole to $2,784. That *Henry Hurtt* permitted *Salisbury* to take possession of the land without ever obtaining from *Salisbury* any security for payment of the purchase money, except *Salisbury's* own responsibility. That on the 29th of August 1819 the complainant intermarried with *Adah Hurtt*, one of the children of the testator, and that she died on or about the 18th of February 1821, without leaving any child. That *Henry Hurtt* brought a suit in *Kent* county court in September 1819 against *Salisbury*, for recovery of the purchase money due for the land sold as aforesaid, and obtained judgment against him at March term 1821, for $3,223 63, and costs of suit. In the rendition of which judgment *Salisbury* obtained an allowance for one-ninth of the original purchase money, he having intermarried with one of the daughters of the testator. That *Henry Hurtt* permitted *Salisbury* to hold, possess, use and occupy, and to receive the issues and profits of the said land from the year 1814 until September 1819, without using any legal process or means to obtain security for payment of the purchase money, or to recover the purchase money, or to regain possession of the land. That *Henry Hurtt* had never paid to the complainant, or to his wife *Adah*, any money either on account of any rents, issues or profits, or on account of the purchase money of the said land. The bill then states, that since the rendition of the judgment

above mentioned, *H. Hurtt* had become possessed of the land which he had sold to *Salisbury*, and now holds the same. *Prayer*, that *H. Hurtt* may be compelled to pay to the complainant the one-ninth part of $2,784, with interest on such ninth part, &c. and for general relief. The answer of *H. Hurtt*, the defendant, (now appellant,) admits the death of his father *James Hurtt*, and that he died seized and possessed of a considerable real and personal estate, leaving the children named in the bill; and by his will devised and disposed of his property as stated in the bill, and that the defendant took upon himself the execution of said will, &c. That he advertised for sale the land mentioned in the will, and at the sale of the land in *Kent* county, in August 1814, *Samuel Boyer* became the purchaser thereof for the sum of $14 50, per acre, amounting in the whole to $2,784. That *Boyer*, at the time of the sale, declared that he had purchased the land for *James Salisbury*, to whom the said land was charged by the defendant, the said *Salisbury* being at that time confined by indisposition, and not able to attend the sale. That *Salisbury* was then in good credit, and considered and reputed to be in good circumstances, and the defendant felt perfectly secure. That by the conditions of the said sale, possession of the land was to be given on the 1st of January 1815, on which day possession was accordingly delivered to *Salisbury*, who had seeded wheat on the said farm in the preceding fall. That some time after the 1st of January 1815, the defendant called on *Salisbury*, and requested him to give his bond for the purchase money with such security as the defendant should approve, when he was informed by *Salisbury* that so soon as the defendant would give him a deed for the land purchased by him, he would pay the defendant therefor, as he was in constant expectation of receiving a large sum of money from the sales of *John Black's* real estate; and that the defendant was not authorised by the said will to give such deed. The defendant having been instructed that he was not authorised by the said will to give a deed for the land sold by him, had a bill filed in the court of chancery, and obtained a decree in 1818, authorising and empowering him to make a deed for the said land. After which the defendant again called on *Salisbury* for payment

of the land, who promised to pay for the same, but neglected, and ultimately refused to do so; whereupon the defendant in 1819 brought suit against him in *Kent* county court for the purchase money—the land having been very materially injured and lessened in value since the sale of it in 1814; and the defendant then, and still believing, that if again sold it would not have brought, by a large sum, the price at which it had been sold to *Salisbury*. That at September term 1820, the said suit was referred to *Ephraim Vansant*, &c. by rule of the court, and the said arbitrators returned their award to court, and judgment was thereupon entered; which award included the original purchase money of the land, with interest thereon, also an account due from *Salisbury* to *J. Hurtt*, the testator, and sundry other transactions between the defendant and *Salisbury*, and for which the defendant had also sued *Salisbury*. From all which it will be seen, that after deducting from the claims allowed to *Salisbury* against the defendant as executor and trustee of *J. Hurtt*, deceased, the sum of $140 75, for the debt due from *Salisbury* to *J. Hurtt*, deceased, and which debt the defendant, in the settlement of the personal estate, had acknowledged and became answerable for as a sperate debt, there remained the sum of $802 40, to be credited as a payment by *Salisbury* for the purchase money of the land. The answer further stated, that at the time of the rendition of the judgment against *Salisbury*, he had become utterly unable to pay the same; and the defendant, believing that *Salisbury* was insolvent, and being unwilling to enter into a suit in chancery to obtain a second sale of the said land, and to eject *Salisbury*, had at sundry times applied to him, and did not obtain the possession until shortly after harvest in July 1822. That a day or two after the defendant had taken possession, *Salisbury* threatened to proceed against the defendant for a forcible entry and detainer; and the defendant believing it to be as unprofitable as it was unpleasant to enter into a law suit with *Salisbury*, agreed to execute, and did execute, a paper purporting to release *Salisbury* from the judgment, in consideration of his giving up the full possession of the land to the defendant, and *Salisbury* thereupon executed a paper, purporting to be a release, &c. The defendant thereupon advertised the said land to be sold on

the 7th of September 1822, but there being no purchaser, the land was again advertised to be sold on the 15th of March 1823, when the same was sold to *Edward Hurtt* at and for the sum of $7 25, amounting in the whole to $1,435 50. That the defendant, finding that there was very little prospect of selling the land for a large price, had authorised *Edward Hurtt* to bid for the same for and on the behalf of him the defendant; and *E. Hurtt*, having been the highest bidder and purchaser, the defendant has since kept possession of the land, considering it his own property, and holds himself liable to the devisees of his father, or to their proper representatives, for their several and respective proportions of the price at which the same was sold. The defendant denies that he at any time received any other sum for or on account of the purchase money of said estate from *Salisbury*, other than the credit in the said award by the referrees, or for or on account of the profits of said land, except what money he considered a fair price for a crop of wheat which was seeded on the land in 1822 by the defendant, and which was reserved by the defendant at the sale in 1823. That in giving a release to *Salisbury* the defendant relinquished his claim to the sum of $161 98, with interest thereon, of his own money, due from *Salisbury* to him for goods sold, it being in part of the amount for which the award and judgment had been rendered, and that he was induced to do so from a well grounded belief that *Salisbury* never would pay the claim, and that in the meantime the land purchased by him would regularly become less valuable. The defendant admitted that the complainant did intermarry with *Adah Hurtt*, and that she is since dead, without ever having had issue by the complainant. He submits to the court whether the complainant can claim or recover any part of the money due for the sale of the said land, or whether the right and interest of the said *Adah* in and to the same, does not survive to the other children and heirs at law of *J. Hurtt*, deceased. He admits he never paid to the complainant, or to his wife *Adah*, any part of the purchase money, or any thing for or on account of rents or profits of the said land. The County Court, [*Earle*, Ch. J. and *Purnell*, and *Wright*, A. J.] passed the following decree, viz. The court are of opinion that the land in *Kent* county, devised by *James*

*Hurtt* to be sold, is to be considered as money, and that his daughter *Adah's* part of it has devolved on the complainant by his marriage with her. The court therefore adjudge that *James Fisher*, the complainant, in right of his wife is entitled to, and that he recover of the said *Henry Hurtt*, the trustee, one ninth part of the proceeds of the sale of the said land, sold by him to *James Salisbury* in the month of August 1814, deducting therefrom all reasonable expenses of the said trustee, as well as a reasonable sum for his commissions—the said trustees having, in the judgment of the court, been guilty of the grossest neglect in his negotiations with *Salisbury*, and in the management of the trust fund. *Decreed*, that the defendant pay to the complainant the sum of $295 22½, with interest from the 1st of January 1815 till paid, according to the statement annexed, and costs. From which decree the defendant appealed to this court.

The cause was argued at last June term before BUCHANAN, Ch. J. and MARTIN, STEPHEN, ARCHER and DORSEY, J.

*Chambers*, for the Appellant, contended, 1. That the bill of complaint does not sufficiently charge gross neglect in the defendant below to justify the decree. 2. That it was not competent in the court to pass the decree without a previous reference to the auditor, before whom the defendant could have claimed and proved his expenses and disbursements necessarily incurred in the execution of his trust.

*Eccleston*, for the Appellee, insisted, 1. That after the sale of the land on the 27th day of August 1814, made to *James Salisbury* by the appellant, as trustee under the will of his father, the right and interest of the appellee, and his wife *Adah*, in and to the amount of the sale thereof, must be considered *quasi* personal property; and that notwithstanding the death of the said *Adah* since the said sale, without ever having had issue born alive, the appellee, in right of his wife, is entitled to the same interest in and to the amount of the sale thereof as the appellee, and his wife *Adah*, would be entitled to were she still living.

2. That there has been such neglect and misconduct on the

part of the appellant as trustee under the will of his father, in relation to the sale of the said land, as renders him liable to pay unto the appellee the one-ninth part of the net amount of the sale of said land, as made on the 27th day of August 1814, together with legal interest thereon from the 1st day of January 1815, until paid.

3. That if the appellee is not entitled to the one-ninth part of the amount of the sale, as made on the 27th day of August 1814, he is entitled to such other relief in the case as a court of equity would think proper to grant unto the appellee, and his wife *Adah*, were she still living

*Curia adv. vult.*

MARTIN, J. at this term, delivered the opinion of the Court. That a trustee is answerable for money lost by his *gross* negligence, is a principle of law well established; and whether *Hurtt* has been guilty of such negligence as to make him answerable for the amount of the purchase money on the first sale, must depend upon the facts admitted in the answer.

It appears the will was proved in 1814, and that in August of the same year the lands in *Kent* county were sold by *Hurtt* to *Salisbury*. The terms of this sale, whether for cash, or on credit, are no where stated in the record. If it was for cash, it was the duty of the trustee, upon payment being refused, to have instituted legal process to enforce it; and if on credit, he ought, in a reasonable time after the sale, to have obtained from the purchaser, bond and security for the purchase money; and at all events, the possession of the land ought to have been retained by him until the necessary security was given. But we find in this case, that no security was ever obtained for the purchase money; and although the land was sold in 1814, no attempt was made to enforce the payment of it by legal process, until some time in the year 1819, and yet the possession of the land was given up to *Salisbury* in January 1815. This affords at least strong *prima facie* evidence of very gross neglect, and unless satisfactorily accounted for by the trustee, would make him liable for the money on the first sale. How does he attempt to avoid it? That *Salisbury* refused to pay the money until the trustee gave him a deed, and *that* he could not do, without an application to the court of chancery.

If a deed was necessary in this case, did the trustee use reasonable diligence to obtain authority to give it? He was informed in 1814 a deed was required by the purchaser, and that the money would be paid when a deed was executed; yet he never obtained a decree in chancery for this purpose, until the year 1818, about four years after the original purchase. If there were circumstances beyond his control to justify this delay, it was incumbent on him to have stated them in his defence; but in the absence of such allegations, which if they had existed, must have been in the knowledge of the trustee, the court have no right to presume them. If in a reasonable and proper time, the trustee had filed a bill in chancery to authorise him to give a deed, there can be no doubt that the chancellor, having all the proper parties before him, and there being no legal objection to the contrary, would have passed a decree to confirm the first sale; to authorise the trustee, upon the payment of the purchase money, to give a deed, and to order the money to be brought into court, to be applied, under the direction of the chancellor, according to the provisions of the will. But this was not the conduct of the trustee. Without any authority, (so far as this record speaks,) he again sold this land in 1823, and became himself, through his agent, the purchaser for seven dollars and twenty-five cents the acre, just one half of the original purchase money, and now holds and possesses the land, under that purchase. With this view of the case, the court must charge the trustee with grossly improper conduct, more especially as from the facts disclosed in the answer, there is strong ground to believe, if he had faithfully performed his trust, the original purchase money might have been saved. It is stated that *Salisbury*, at the time of the sale, was in good credit and circumstances, and if a deed had been tendered to him in a reasonable time, it is fairly to be presumed the purchase money would have been paid or secured to the trustee.

The next question presented to the court, in this case is, whether the purchase money arising from the sale of this land in 1814 is to be considered as money, and would devolve upon *James Fisher*, whose wife died after the sale?

We feel no difficulty upon this part of the case. We con-

cur in opinion with the court below, that the land in *Kent* county devised by *James Hurtt* to be sold, and sold in 1814, is to be considered as money, and that *James Fisher* is entitled to the same portion of it, upon the death of his wife, as he would have been authorised to receive, had she been alive.

The general rule of law, that lands devised to be sold are thereby turned into money, and construed in equity as personal estate, is fully sustained, not only by the authorities cited by the counsel for the appellee, but by many others, were it necessary to resort to them. See *Doughty vs. Bull*, 2 *P. Wms.* 320. *Lechmere vs. Earl of Carlisle*, 3 *P. Wms.* 215. *Best vs. Stamford*, 1 *Salk.* 154. *Maberly vs. Strode*, 3 *Ves.* 450, 456. *Trelawney vs. Booth*, 2 *Atk.* 307. *Craig vs. Leslie, et al.* 3 *Wheat.* 563. *Fisher's* wife dying after the sale, leaves no doubt of his right to recover.

DECREE AFFIRMED.

## M'Culloh *vs.* Dashiell's Adm'r.—June, 1827.

C & T drew a bill in favour of M, on D & B, partners in trade, which they accepted. M sued D & B at law on their acceptance, and pending the suit D died. Judgment being had against B, he being insolvent obtained a discharge under the act relating to insolvent debtors. The defendant administered on D's estate, and received assets from his separate property to a large amount, though insufficient to pay D's individual debts, *and also received some of the partnership funds.* The judgment not being paid, and the partnership funds being insufficient to pay its debts, M filed a bill in equity against D's administrator, claiming to be paid out of the separate assets, and equal proportion with D's separate creditors. *Held*, that he was not entitled to recover.

Joint creditors in equity can only look to the surplus of the separate estate, after the payment of the separate debts.

Separate creditors, in equity, can only seek indemnity from the surplus of the joint fund, after the satisfaction of the joint creditors.

Where the claims of joint creditors do not come into conflict with those of the separate creditors, but only with the interests of the representatives of the deceased partner, equity will decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several.

At law the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, without restriction from a court of equity; yet when by the death of one of the

parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, that court will give to the separate creditors all the advantages, thus by accident thrown upon them. The assets of insolvents are distributable according to equity.

Appeal from *Somerset* County Court, sitting as a court of equity. In this case the bill of the complainant, (now appellant,) stated, and the parties admitted, that in 1817 *Peter Dashiell* and *Richard Bennett* were partners in trade, dealing in merchandise, under the firm of *Dashiell* and *Bennett*. That *Chase* and *Tilyard*, being indebted to the complainant, drew a bill of exchange on *Dashiell* and *Bennett*, directing them to pay to the order of the complainant $700, which was accepted by *Dashiell* and *Bennett*. That the complainant in the year 1818 instituted a suit at law against *Dashiell* and *Bennett* for the recovery of the money due on the said acceptance, and pending the suit *Dashiell* died intestate. That judgment was afterwards recovered against *Bennett*, the surviving partner, and upon the return of the execution issued on the judgment, *Bennett* petitioned and obtained the benefit of the act for the relief of insolvent debtors. That at the time of his petition and discharge he had no property; and no part of the said judgment had been paid. That the defendant (the appellee,) obtained letters of administration on the estate of *Dashiell*, and had assets in his hands to the amount of $13,061 43. That the personal estate of *Dashiell* is insufficient to pay his separate and private debts. That the defendant, as his administrator, had received of the partnership funds $35 93. The complainant claimed to be paid out of the assets in the defendant's hands, an equal proportion of their claim with the other creditors of *Dashiell*. But the County Court, [*Martin*, Ch. J. and *Robins*, A. J.] refused to allow the complainant's claim, and decreed that no part of his claim should be paid, except from the partnership funds, until the separate and individual debts of *Dashiell* should be first paid; and that the surplus, if any, should be applied to the payment of the partnership debts, and not otherwise. From this decree the complainant appealed to this court.

The cause was argued at last June term before Buchanan, Ch. J. and Earle, Stephen, Archer, and Dorsey, J.

*J. Bayly*, for the Appellant, stated the question to be, Whether the complainant in the court below, and now appellant, was entitled to be paid an equal proportion of his claim, with the other creditors, out of the assets in the defendant's hands? Or whether his claim shall be postponed until all the separate and individual creditors shall have been first paid, and only admitted to a proportion of the surplus, if any?

To show that the complainant was entitled to be paid an equal proportion of his claim with the separate creditors of *Dashiell*, out of the assets in the hands of the defendant, he referred to the acts of 1798, *ch.* 101, *sub ch.* 8, *s.* 17, and 1805, *ch.* 110, *s.* 7. *Murray & Sansom vs. Ridley's Adm'x.* 3 *Harr. & M'Hen.* 175. *Hamersley vs. Lambert*, 2 *Johns. Ch. Rep.* 508. *Tucker vs. Oxley*, 5 *Cranch*, 34, 39. *Ex parte Elton*, 3 *Ves.* 238. *Stephenson vs. Chiswell, Ib.* 566.

*R. N. Martin* and *Tingle*, for the Appellee. Where there is a separate estate, and individual and co-partnership creditors, the first have the first claim out of the estate. The interest which co-partnership creditors have, is after the payment of individual debts. 2 *Madd. Ch.* 463. Partnership effects shall in the first place be applied to pay partnership debts. The separate creditors can only resort to the surplus. 1 *Madd. Ch.* 463. 2 *Madd. Ch.* 466. *Ex parte Crowder*, 2 *Vern.* 706. *Ex parte Hunter*, 1 *Atk.* 227. *Ex parte Cook*, 2 *P. Wms.* 500. *Ex parte Elton*, 3 *Ves.* 238. *Ex parte Clarke*, 4 *Ves.* 677. *Ex parte Abell, Ib.* 837, 839. *Thomas vs. Frazer*, 3 *Ves.* 399, *(note.)* *Ex parte Clay*, 6 *Ves.* 813. *Ex parte Reeve*, 9 *Ves.* 590. *Gray vs. Chiswell, Ib.* 124. *Gow on Part.* 270, 271, 272, 317, 367, 461. 1 *Bac. Ab.* tit. *Bankruptcy*, 466. *Lane vs. Williams*, 2 *Vern.* 277, 292. *Simpson vs. Vaughan*, 2 *Atk.* 31.

*J. Bayly*, in reply, cited *Murray vs. Murray*, 5 *Johns. Rep.* 60. Act of 1798, *ch*, 101, *sub ch.* 8, *s.* 5, 7, 10, 16. *Ex parte Hodgson*, 2 *Bro. Ch. Rep.* 5. *Harrison vs. Sterry*, 5 *Cranch*, 302.

*Curia adv. vult.*

Archer, J. at the present term, delivered the opinion of the court. The bill filed in this cause states that a bill of exchange was on the 18th of August 1817, drawn by the firm of *Chase* and *Tilyard* upon *Dashiell* and *Bennett*, co-partners in trade, for the sum of $700, in favour of the complainant, and that it was by the drawees duly accepted; that a suit was instituted against *Dashiell* and *Bennett* upon the said acceptance by the complainant; that pending the action in *Somerset* county court, the intestate of the defendant, and one of the firm of *Dashiell* and *Bennett* died, and judgment was obtained against *Bennett* the surviving partner. That *Bennett* applied for and obtained the benefit of the insolvent laws of this state, having been finally discharged at November term 1820, no part of the claim having been paid; that the said surviving partner had no property either joint or separate, wherewith satisfaction could be made of the said debt. That *Parsons*, the respondent, took out letters of administration on the estate of *Dashiell;* and prays that a decree may pass directing the administrator to pay the amount of the acceptance from the assets of the deceased, or such part thereof as, upon a just distribution of the assets, he may as one of his creditors be entitled to. The bill of exchange above referred to, the judgment, and certificate of the final discharge of *Bennett*, are filed as exhibits in the cause; and the following admission of counsel is contained in the record: "That the trustee of *Richard Bennett*, an insolvent debtor, has not received any property belonging to *Bennett;* that no part of the debt due to the complainant has been paid either by the trustee, or by *Bennett;* that the personal estate of *Dashiell* is insufficient to pay his private and individual creditors; that the defendant has received of the partnership debts due to the firm of *Bennett* and *Dashiell*, $35 93. The parties moreover admit the exhibits above stated as testimony, and waive the formality of making either the trustee, or *Bennett* the surviving partner, a party to these proceedings."

The question presented for the decision of this court upon this record, is whether the complainant is entitled to be paid an equal proportion of his claim, with the separate creditors of *Dashiell*, out of the assets in the defendant's hands; or whe-

ther the claim, being a joint claim, shall be postponed until all the separate creditors shall be first fully paid?

The question thus stated is one of considerable importance; and although, undoubtedly, of very frequent occurrence in the subordinate testamentary tribunals, has never, we believe, received an adjudication in the appellate court, or in any of the higher courts of original jurisdiction.

There are very few cases in the *English* books bearing directly upon the distribution of assets, in a case situated as this is. It has been contended in argument, that it must be governed by the principles adopted in *England* in the marshalling of assets in bankruptcy. And as *they* are distributed *according to equity*, if the rule can be definitively ascertained, it ought to govern here. But an examination of the authorities, will show, that it has been very unsteady and fluctuating; varying frequently in form, often in substance, according to the ideas entertained by each succeeding chancellor, of the rights of the joint and separate creditors; and moulded more upon their notions of convenience to all the parties concerned, than as standing upon legal reasoning. *Dutton vs. Morrison*, 17 *Ves.* 205. Amid the multitude of decisions which have taken place upon this subject, it is no easy task to trace the history of the rule of distribution in bankruptcy.

But this examination will satisfy us, that amidst all the fluctuations of the rule, the principles established in the first cases occuring more than a century since, have but for a short period, been materially encroached upon; and that now the leading principles of distribution, with some modifications, are what they were originally established to be.

In *Ex parte Crowder*, 2 *Vern.* 706, decided in 1715, which was an application on the part of the separate creditors, to be let in under a joint commission, the separate estate being of small value, it was decided that they might be permitted to prove their claims under the joint commission, but that the joint funds were applicable, in the first instance, to the payment of joint debts, and then the separate debts; and that the separate effects should be applied to the payment of the separate debts, and that the surplus should go to the liquidation of the joint debts. In *Ex parte Cook*, 2 *P. Wms.* 500, (in 1728,)

Lord Chancellor *King* followed the determination in *Ex parte Crowder*, and declared it to be settled, and that it was a resolution of convenience, that the joint creditors shall be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be on the other hand a surplus of the separate estate, beyond what will pay the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. In *Ex parte Hunter*, 1 *Atkyns*, 228, (in 1742,) Lord *Hardwicke* says, as between joint and separate creditors the joint estate shall be applied to the joint creditors, and the separate estate to the separate creditors. The rule that prevailed during the administrations of Lords *King* and *Hardwicke*, from 1715 down to the time of Lord *Thurlow*, was that joint creditors could not prove under a separate commission, for the purpose of receiving dividends with the separate creditors, (*Watson on Part.* 244, *Ex parte Taitt*, 16 *Ves.* 195;) but only for the purpose of going for the surplus after the satisfaction of the separate creditors. But Lord *Thurlow* broke in upon the established practice of the court, which had prevailed for sixty years; and in 1785, in *Ex parte Hodgson*, 2 *Bro. Cha. Rep.* 5, resolved that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu*, with the separate creditors. This resolution laid down, as it is, in broad and general terms, would appear to have broken down all the boundaries previously established, between the rights and priorities of the joint and separate creditors; yet if taken with the limitations with which it is said, by *Watson on Partnership* to have been qualified, it will appear to have made this innovation only —that they should all, joint as well as separate creditors, be permitted to prove their claims against the separate estate upon a separate commission; but that it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction upon the order

in bankruptcy. And that this was the consequence of Lord *Thurlow's* adjudication is apparent from Lord *Rosslyn's* judgment in *Ex parte Elton*, 3 *Ves.* 238. Thus the rights of the joint and separate creditors, on their respective funds where there was a joint estate, was maintained, notwithstanding the alteration thus made in the order in bankruptcy. In the case of *Ex parte Elton*, decided in 1796, the rule established in 1785, was deemed by the then chancellor to be an inconvenient one, because every order which he passed in bankruptcy, that the joint creditor should receive a dividend out of the separate estate, might give rise to a bill in equity, on the part of the separate creditors to restrain this order and to secure the appropriation of the separate estate to the satisfaction of the separate debts; and it was adjudged, that a joint creditor might prove his claim under a separate commission, not for the purpose of receiving a dividend, until an account should be taken of what he had or might have received from the partnership effects. Thus the chancellor, in the modification which he gave to the order in bankruptcy, exercised his equity jurisdiction, and gave to each order the operation of an injunction, without the expense of a bill, whereby the joint creditor was restrained from coming on the separate fund until, in the final adjustment of the co-partnership and individual accounts, equity should determine what portion of the separate funds should be allotted to the joint creditor. And he says, that the joint creditors are in the situation of a person having two funds. The court will not allow him to attach himself to one fund, to the prejudice of those who have no other, and *to neglect the other fund.* He has the law open to him, but if he comes to claim a distribution, the first consideration is, what is that fund from which he seeks it? It is the separate estate which is particularly attached to the separate creditors. Upon the supposition there is a joint estate, the answer is, apply yourself to that, you have a right to come upon it. The separate creditors have not. Therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund. Thus it would appear that the ancient order of distribution was restored with this modification, that the joint creditors might prove, but could not, as before, receive dividends without the

further order of the chancellor, which should be made after the settlement of accounts, which were directed to be kept, as before, separate. This important principle also seems distinctly to be set up by this decision, that where there are *no joint effects*, and no solvent partner, that the joint creditors might be permitted to come in with the separate creditors, a doctrine which appears to have been first recognized by Lord *Thurlow*, in *Ex parte Hayden*, 1 *Bro. Ch. Rep.* 453, for before that period it has been seen that they could only come upon the surplus. This doctrine Lord *Eldon* has uniformly adhered to, although it will be found that he repeatedly complains of it, as a rule producing some inconveniencies, and liable to several objections, as will be seen by a reference to *Ex parte Pinkerton*, 6 *Ves.* 813, *(note.)* *Ex parte Kensington*, 14 *Ves.* 447. *Ex parte Kendal*, 17 *Ves.* 521. *Ex parte Abell*, 4 *Ves.* 837. In the case of *Ex parte Kensington*, the joint creditors were forbid receiving dividends with the separate creditors, on the ground that there was one *solvent partner*, although there was *no joint estate.* That the petitioner would have been allowed had the partner been bankrupt, is the necessary inference from the case; and in the former case the joint creditors were permitted to come in where there were no joint effects, upon the ground that the solvent partner was abroad, and that therefore the difficulty was increased in resorting to him.

Such is a succinct history of the law upon this subject, and the modern doctrine has been summarily stated by *Eden*, in his notes to *Ex parte Hodgson*, 2 *Bro. Ch. Rep.* 5, by *Vesey* in *Ex parte Taitt*, in his 16th vol. 194, *(n,)* and also by *Maddock*, in the 2d volume of his treatise on the principles and practice of the Court of Chancery, 463. They all unite in saying, (and they are fully supported by the authorities cited by them respectively,) "that the joint creditor may prove under a separate commission, for the purpose of assenting to, or dissenting from, the commission, or of going against the surplus after the satisfaction of the separate debts, not to vote on the choice of assignees, or receive dividends with the separate creditors, (except a joint creditor who is a petitioning creditor under the commission,) or where there are *no joint effects*, or no solvent partner, or no separate debts, or the joint creditors

will pay twenty shillings in the pound to the separate creditors."

The case of *Gray vs. Chiswell*, 9 *Ves.* 124, as it is strongly illustrative of the above doctrines, and was a case, not in bankruptcy but in equity, will be particularly adverted to. A bill was filed by the creditors of *Cook* against the heir and executrix of *Chiswell*, claiming to come upon the real estate of *Chiswell*, for the amount of their debts, as the personal estate had been absorbed by specialty creditors. *Chiswell* had been a partner of *Nantes; Nantes* had survived him, and had become bankrupt. The joint creditors of *Nantes* and *Chiswell* proved their claims before the master. The joint estate was insolvent, being only able to *pay an inconsiderable dividend*, and the sum proposed to be raised by a sale or mortgage of *Chiswell's* real estate, was not more than sufficient to pay the separate creditors. A contest arose between the joint and separate creditors, the former insisting on their right to come in *pari passu* with the separate creditors, upon this fund, thus proposed to be raised out of his separate estate. But the Chancellor (Lord *Eldon,)* refused to permit them, upon the ground that in bankruptcy it could not be done, and that the accidental death of *Chiswell* ought not to put the joint creditors in a better situation than they would have been, had he lived and become bankrupt. If there *be any estate* for distribution among the joint creditors, although the surviving partner is bankrupt, they are not, in bankruptcy, permitted to come in with the separate creditors. The chancellor, therefore here, as in bankruptcy, would not permit the joint creditors, who had effectuated their claims under the commission against *Nantes*, although they had received but an inconsiderable dividend, to come in *pari passu* with the separate creditors. There was here *some* joint estate, and then the general rule applied, that each species of creditor must be satisfied out of the fund to which his debt particularly attaches itself; and the rule has been carried to this extent, that if there be a joint fund *of any, even the smallest description* which is capable of being realized, the rule *is inflexible*, and the joint creditors will not be permitted to receive dividends from the separate estate. *Ex parte Peake, Gow. on Part.* 408. Thus we perceive from the case of *Gray*

*vs. Chiswell,* that the rule, which is applied in bankruptcy, is extended to cases in equity.

It is difficult to say upon what the rule in equity and in bankruptcy, with the modification above stated, is founded. The joint estate is benefited to the extent of every credit which is given to the firm, and so is the separate estate in the same manner enlarged by the debts it may create with any individual, and there would be unquestionably a clear equity in confining the creditors to each estate respectively, which has thus been benefited by their transactions. So far the rule is sensible and intelligible; and although at law the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several, without the possibility of the interposition of any restraining power of a court of equity; yet when, by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, a court of equity will give to the separate creditors all the advantages thus by accident thrown upon them, and will not, by adopting the rigorous rule of the law merchant, thereby injure and prejudice the separate creditor, upon whom, viewed in connexion with the separate fund, it always looks upon as meritorious and entitled in the distribution of assets to the preference. But although a court of equity, as against the separate creditors, will not adopt the law merchant, which considers the contract both joint and several; yet whatever doubts have heretofore been entertained on the subject, where the claims of these joint creditors do not come into conflict with the separate creditors, but only with the interests of the representatives of the deceased partner, it is now undeniably settled, that equity will, as against such representatives, decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several.

But although these distinctions are built on the solid foundations of reason and justice, it is not altogether so easy to perceive, why, when there is no joint fund, and *no* solvent partner, (by no solvent partner is meant bankrupt partner,) the joint creditor should thereby acquire the equitable right of coming

in with the separate creditors *pari passu*, upon a fund in no manner benefited by the creation of his debt. Such, however, is the settled and established rule, as we are enabled to collect it both in bankruptcy and in equity; and according to this rule the complainant could not, in this case, be permitted to seek indemnity for his claim, from the separate estate *pari passu* with separate creditors, as it is a conceded fact in the cause, that there are joint funds, although very inconsiderable, and greatly insufficient to pay the debt of the complainant.

But were not this the fact, this court would have no difficulty in saying, that the complainant should be postponed to the separate creditors; and that whether there was any joint estate or not, he should not be permitted to divide with the separate creditors a fund insufficient to pay them. We are, therefore, disposed to adopt the ancient rule as more consonant to equity and justice, that the joint creditors can only look to the surplus, after the payment of the separate debts; and on the other hand, that the separate creditors can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors.

It is believed that the case of *Tucker vs. Oxley*, 5 *Cranch*, 34, somewhat militates against the views which we have taken of the *English* law upon this subject, and it has been pressed upon the court, by the appellant's counsel, as containing principles decisive of this case. It was there determined, that under the bankrupt law of the *United States*, (and the bankrupt law of *England* and that of the *United States*, so far as connected with the matter there decided, are nearly identical,) that a joint debt may be set off against the separate claim of the assignee of one of the partners, but that such set-off could not be made at law, independent of the bankrupt system. The particular decision in this case, it is not material perhaps to examine, because it was a case at law, and the relations of the parties were materially different. It would perhaps be sufficient to say, that the Supreme Court, although they conceive a legal right exists in the joint creditors to prove and receive dividends out of the separate estate, explicitly admit, that such right it is competent for a court of equity to restrain, and to compel the exercise of such right in such manner

as not to prejudice or to do injustice to others. We might, in any view of the cause before us, dismiss, without further observation, the case of *Tucker vs. Oxley;* but we cannot forbear remarking, that the case upon which the court there build their opinion, that a legal right universally exists in the joint creditors upon a separate commission to come on the separate estate *pari passu* with the separate creditors, is the case where a joint creditor is the petitioning creditor, and is an excepted case from the general rule. (*Vide* argument of Sir *Samuel Romily* in *Ex parte Ackerman*, 14 *Ves.* 604, and the authorities referred to by *Vesey.*) *Maddox* in his 1st vol. 463, considers this *a singular* exception to the general rule; and the reason assigned for the adoption of the exception is, that the joint creditor, having petitioned for the commission of bankruptcy, it might be considered in the nature of a modified execution, taken out by him, as well for his own benefit as for that of the separate creditors; and that it would be against all equity to permit the separate creditors to prevent the joint creditor from reaping the fruits of an execution taken out for his and their mutual benefit.

Thus, without encroaching upon any decided case, and acting in strict conformity to the settled doctrines, it must be determined, that although *Bennett* is a certificated insolvent, yet as the separate estate of *Dashiell* is insufficient to pay his individual debts, the complainant, a joint creditor of *Bennett* and *Dashiell*, cannot be permitted to come in *pari passu* with the separate creditors of *Dashiell.*

DECREE AFFIRMED.

MORRIS *vs.* BRICKLEY & CALDWELL.—June, 1827.

Where a plaintiff offers no testimony, or such, as is so slight and inconclusive, that a rational mind cannot draw the conclusions sought to be deduced from it, it is the right of the court, and their duty, when applied to for that purpose, to instruct the jury, that he is not entitled to recover.

A positive and absolute direction to the jury will not be granted, if it obliges the court to discredit a witness; to do that the intervention of a jury is peculiarly necessary.

APPEAL from *Cecil* County Court. *Assumpsit* for money laid out, lent, advanced and expended. The plaintiff, (now ap-

pellant,) at the time of filing his declaration, filed therewith an account of his claim against the defendants (the appellees,) with an account of sales of 100 barrels of herrings received by the plaintiff from the defendants, and by him sold to sundry persons, among others, 51 barrels sold in September and October 1817 to *Joseph B. Eves*, at $4 50. per barrel, amounting to $229 50. After deducting freight, commission, &c. the balance of the whole amount of the sales of the 100 barrels was $305 76. The account raised by the plaintiff against the defendants, charged them with cash at sundry times, with interest, &c. amounting to $185 56, and credited them with the amount of the sales of the 100 barrels of herrings $305 76, deducting therefrom 51 barrels sold to *Joseph B. Eves*, at 60 days, and unpaid, at $4 50, per barrel, $229 50. Thus reducing that credit to $76 26, and allowed interest thereon, $6 76, making a balance due to the plaintiff of $102 54. From this sum the plaintiff's commission of 2½ per cent. on the sale of the 51 barrels to *Eves*, amounting to $5 75, was deducted, leaving due the plaintiff $96 81. The defendants pleaded the general issue.

At the trial the plaintiff produced and offered in evidence the account referred to in the declaration, (which account had been sworn to by the plaintiff, and by *N. C. Neilson*, his clerk, before a notary public for the state of *Pennsylvania*,) and also the depositions taken under a commission regularly issued and returned in this cause, viz. that of *Samuel Archer*, who affirmed that in July, August, September, and November 1817, he sold to *Joseph Bennett Eves* on an average credit of not short of four months, goods to the amount of more than $4,000; and at the time of the failure of said *Eves*, the affirmant was a creditor to the amount of more than $10,000; that at the time of said *Eves'* failure, he was indebted to the amount of not less than $70,000—many of the most intelligent and respectable merchants of *Philadelphia* being amongst his creditors. That there are grades of credit in *Philadelphia*, as in other places, and the affirmant does not consider that the said *Eves* was in the highest grade of credit, yet he believes he might have extended his purchases to a still greater amount than he did. *Charles F. Hozey* deposed that he knows the plaintiff, but he did not know the defendants; that the dealings of the

parties as referred to in the plaintiff's statement, did take place; that he knows that about the months of September and October 1817, the plaintiff sold to *Joseph Bennett Eves* a quantity of herrings, for the amount of which he took the said *Eves's* notes, which he endorsed and deposited in bank for collection, as is customary; but the same never were discounted, nor the money obtained from *Eves* for the same. The deponent knows the facts he has above testified, from his having been a clerk of the plaintiff, at the time the transaction took place, and to the present period. The defendants then prayed the court to direct the jury, that the evidence produced was not sufficient to support the action. Which direction the Court, [*Earle*, Ch. J. and *Worrell*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and MARTIN, ARCHER, and DORSEY, J. by

*Gale*, for the Appellant, and by
*Carmichael*, for the Appellees.

DORSEY, J. delivered the opinion of the court. This court have, on more occasions than one determined, that where there is no testimony, or where the testimony offered is so slight, and inconclusive, that a rational mind could not draw the conclusions sought to be deduced from it, that it is the unquestionable right of the court, and their imperious duty, when applied to for that purpose, to instruct the jury, that the plaintiff is not entitled to recover. Whether the case at bar comes within the operation of this decision, is the question now to be considered, and its determination depends upon the proof offered to the jury, and all the circumstances admissible in argument before them, connected with this controversy, as they appear upon the face of the record. The appellant having filed his declaration, also filed in court an account showing the transactions between the parties, and the nature of the claim on which the action was founded. Which account showed the consignment by the appellees of one hundred barrels of herrings to the appellant at *Philadelphia*, the expenses incident thereto, the price at which

the herrings were sold, the amount thereof received, and the money advanced by the appellant to the appellees. A commission afterwards issued to *Philadelphia* to take testimony. The appellant filed the necessary interrogatories to obtain proof of the items in his account. The appellees in their cross interrogatories, not even insinuating an objection to, or denial of, the receipt of any of the sums of money wherewith they were charged in the account, put their defence solely on the ground, that they were entitled to a credit for the price of the herrings sold to *Joseph Bennett Eves*, (who had become insolvent,) either because the contents of the note he had given therefor had been received by the appellant, or that he had rendered himself personally answerable therefor, as an agent violating his duty to his principal, in selling to a vendee, without credit, or in doubtful circumstances; both of which facts were clearly disproved by the testimony taken under the commission.

The appellees, disappointed in the defence to which their cross interrogatories pointed, at the trial of the cause sought to protect themselves from the claim, by the weakness of the appellant's proof, and to that end prayed the court to instruct the jury, that the evidence produced was not sufficient to support the action. Which instruction the court gave; and from that decision the appellant hath sought relief at the hands of this court, and we conceive it our duty not to withhold it.

*Hozey*, the clerk of the appellant, deposed that the dealings of the parties, as referred to in the appellant's statement, (meaning his account,) did take place; and although he also swears that he did not know the appellees, and that he knew the facts he had testified, from his having been a clerk of the appellant at the time the transaction took place, we by no means think that the weight of his testimony is wholly destroyed thereby, or that in candor or charity this court can impute to him a crime (which scarcely deserves a milder name than perjury,) of having sworn positively to facts of which he had no knowledge. His testimony will bear a different interpretation, and in that light we are disposed to view it. When we look, therefore, to the nature and circumstances of the claim, the proceedings in the cause, and the testimony of the witness *Hozey*, the intervention of a jury, we think peculiarly necessary to settle the rights of the

parties. We consequently dissent from the opinion delivered by the county court, and reverse their judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## NEWTON, *et al. vs.* GRIFFITH, *et al.*—June, 1827.

Before the act of 1786, *ch.* 45, (to direct descents,) a devise of land by A to his son J, and his heirs, and other land to his son G, and his heirs; and in case either of them "*should decease, having no lawful issue or heirs of his body,*" then the surviving son "to have his deceased brother's part of the land," to him and his heirs; and in case both sons "*should decease, leaving no lawful heirs of their bodies,*" then all the aforesaid lands unto the testator's three daughters, S, S, & N, to be equally divided between them, would have vested in J and G each, estates tail general, in the lands respectively devised to them, with cross remainders in tail general, remainder to S, S, & N for life. But by operation of that act, the devise being made in 1792, J and G took virtually estates in fee in the lands devised to them respectively; and on the death of G, without issue and intestate, J, and S, S, and N, surviving him, J took by descent from him, one-fourth of his estate; and J also dying without issue and intestate, that, with the whole of the estate devised to him by his father, descended to his three sisters S, S, and N, as his heirs at law.

On a bill filed against S, S, and N, as heirs at law of J—*Held*, that the land which thus descended from J, was subject to be sold for the payment of his debts.

The words "without issue" in a will, when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there be nothing in the will restricting it to a failure at the time of the death of the first devisee, or to some other time or event.

To have no issue—to die having no issue, and to die without issue, are technically and judicially convertible terms.

The word *leaving*, as well as the words *having* and *without*, in devises—"and if he shall die without *leaving* any issue"—"without *having* issue," or "*without* issue," has acquired a technical judicial decision, and when applied to real estate, means an indefinite failure of issue

In dispositions of personal property, the courts generally incline to the construing a limitation after a dying without issue, to mean a dying without issue at the death of the first legatee, in order to support, if they can, the limitation over; yet in relation to real estate, the construction is generally otherwise.

The circumstance of a limitation over, being to a survivor, and his heirs, or only of a life estate to a person *in esse*, has not the effect, in dispositions of real estate, in either case, to restrict the established legal meaning of the words, "leaving no lawful heirs of their bodies," to a failure at the death of the first taker, or survivor.

If there be a devise to one generally of freehold and personal estates, with-

out any words of limitation, he will take an estate for life only, in the freehold, but the personal property absolutely.

By the act of 1782, *ch.* 23, the ancient mode of docking estates tail, by common recovery, is abolished; and any person seized of any estate tail, in possession, remainder or reversion, may convey the same in the same manner and form that a tenant in fee may.

Before the passage of the act of 1786, *ch.* 45, estates tail were not liable for debts contracted by tenants in tail; but by that act estates tail general, created since its passage, were virtually abolished, and converted into estates in fee simple, and have now all the incidents of lands held in fee; they are descendible, transferrable and devisable, and subject to be sold for the payment of debts, as estates in fee.

Estates tail general, divided among heirs, taken by election or sold by commissioners, are held in fee simple.

By the act of 1786, *ch.* 45, lands held in fee simple and fee tail general, created since its commencement, descend first to the child or children, and their descendants, if any, equally; and if no children or descendants, to collaterals indefinitely.

The legislature having a right to prohibit the creation of estates tail, must have a right to direct in what manner, lands so held by subsequent creation, should descend.

A dying intestate, means a dying without making a valid and operative disposition by will.

Estates tail general, created before the act of 1786, and estates tail special, are excepted from the operation of that act.

APPEAL from *Dorchester* County Court, sitting as a *court of equity.*

The facts in this cause are fully set forth in the opinion of this court, delivered by the chief judge. It was argued at June term 1825, before BUCHANAN, Ch. J. and EARLE, STEPHEN, and ARCHER, J. by

*J. Bayly*, for the Appellants, and by
*Bullitt* and *Kerr*, for the Appellees.

*Curia adv. vult.*

BUCHANAN, Ch. J. at this term, delivered the opinion of the court. The controversy in this case, turns upon the construction of the will of *Joseph Griffith*, the elder, dated the 6th of February 1792, and of the act of 1786, *ch* 45, *s.* 1, the act to direct descents.

The language of the will, (so far as concerns this case,) is, "I give and devise unto my son *Joseph Griffith*, my present dwelling plantation whereon I now live, to him, my said son *Joseph*, his heirs and assigns forever. *Item.* I give and de-

vise unto my son *George Griffith*, the plantation whereon *Levi Oram* now lives. lying on *Transquakin* river, or a branch thereof, to him, my said son *George*, his heirs and assigns forever; and my will is, that all the land which I am now possessed of, either by deed, bond or patent, be equally divided between my said two sons *Joseph* and *George*, according to quantity and quality, share and share alike, to them, their heirs and assigns forever; and in case either of my said sons should decease, *having no lawful issue or heirs of his body*, that then the surviving son to have his deceased brother's part or moiety of the land aforesaid, to him, his heirs and assigns forever, as aforesaid; and in case both my said sons *Joseph* and *George* should decease, *leaving no lawful heirs of their bodies*, that then and in such case, I give and devise all my aforesaid lands, devised as aforesaid, unto my three daughters, *Sophia*, *Sarah*, and *Nancy Griffith*, to be equally divided between my aforesaid three daughters." *George Griffith*, one of the sons and devisees, died intestate and without issue in May 1814 after the death of the testator, who died seized of the devised premises; and *Joseph Griffith*, the other son and devisee, died also intestate and without issue, in November 1814, without leaving personal property sufficient for the payment of his debts. His three sisters, *Sophia*, *Sarah* and *Nancy*, who survived him, and are still living. are his only heirs at law. The bill in this case was filed against them as such, (and their husbands,) and seeks to subject to sale, for the payment of his debts, all the real estate of which he died seized. The defendants in their answer, admit that he died seized in fee of certain lands derived to him by inheritance from his mother, which descended to them, his sisters, as his heirs at law, subject to his debts; but they claim to hold, under the will of *Joseph Griffith* the elder, all the land devised to *Joseph Griffith*, the younger, and his brother *George*, by virtue of the limitation over to them, *Sophia*, *Sarah* and *Nancy*, on the contingency of both their brothers, *Joseph* and *George*, dying without "leaving lawful heirs of their bodies;" and deny that any part of the lands so devised, descended to them from *Joseph Griffith* the younger, as his heirs at law, and insist that

they are not liable for his debts; and a decree *pro forma* passed accordingly.

The case is brought before this court on an appeal from that decree; and the question to be decided is, what estates in the lands devised, passed to *Joseph Griffith*, the younger, and *George Griffith*, respectively, under the will of their father, whether "estates tail general," or "estates in fee simple," with cross limitations over by way of executory devise, as the law stood before the passage of the act to direct descents?

When this case was argued, it was understood that a cause was then depending in this court on the *western shore*, in which the same question was virtually involved; it was therefore thought expedient to hold this case under advisement until that should also be heard. That cause has since been decided. It was the case of *Dallam vs. Dallam*, 7 *Harris & Johnson*, 220, and depended upon the construction of a devise in the will of *Frances Middlemore* made in August 1755, which is in these words: "I give and devise unto the aforesaid *Richard Dallam* and *Josias Dallam*, and to their heirs and assigns forever, as tenants in common, equally to be divided between them, all that tract of land called *Palmer's Forest*, lying on the west side of *Swan Creek;* but if either of them dies before the age of twenty-one years, and without issue, then I will that one equal half part of the said land be held and enjoyed by *Goldsmith Garrettson*, (son of *George* and *Martha Garrettson,)* his heirs and assigns forever, to whom I give and devise the same accordingly. And in case the said *Richard Dallam* and *Josias Dallam* should both die before the age of twenty-one years as aforesaid, and without issue, then I give and devise the whole of *Palmer's Forest* to the aforesaid *Goldsmith Garrettson*, his heirs and assigns forever." It was there contended, that the words "without issue" meant an indefinite failure of issue; that is, a failure of issue whenever it might occur, which was a contingency too remote to sustain a limitation over by way of executory devise; and that, therefore the devisees, *Richard* and *Josias Dallam* respectively, took estates tail. But it was held, on full consideration and an examination of all the principal authorities relating to the subject, that *Richard* and *Josias Dallam* each took

an estate in fee, in the premises respectively devised to them, defeasible by the event of his dying before he attained the age of twenty-one years and without issue; not on the ground that the words "without issue" alone mean a failure of issue at the time of the death of the devisee, or that a limitation over of real estate, on an indefinite failure of issue, is good by way of executory devise; on the contrary the court there explicitly lay down, as settled and established rules not now to be questioned, 1st. That no limitation can be good as an executory devise, unless it be on a contingency that must happen, if at all, within a life or lives in being, and twenty-one years and a fraction of a year afterwards, allowing for the time of gestation; and that if it be on an event, which may or may not happen within the prescribed limits, it is void from the beginning, no matter how the fact turns out afterwards. 2dly. That wherever there is a devise of real estate to one and his heirs, with a limitation over, if he should die without issue, the general words "without issue" mean an indefinite failure of issue; that is, not a failure of issue at the time of the death of the devisee, but a failure whenever they shall become extinct, without reference to any particular time or event, if there be nothing in the will clearly showing a different intention on the part of the testator, and restricting the failure to the time of the devisee's death, or to some other time or event; and that in every such case the contingency is too remote to support an executory devise, as it may not happen within the time prescribed; but the first devisee takes an estate tail, and the limitation over operates as a contingent remainder, expectant upon the precedent particular estate tail. But 3dly. That wherever there are expressions in the will clearly restricting the "dying without issue," to a failure of issue, at the time of the death of the first taker, or to some other time or event which must occur, if at all, within the time allowed for the happening of a contingency, on which an executory devise may be limited, there the first devisee takes an estate in fee simple, and the limitation over is void as a contingent remainder, but good by way of executory devise. And on the peculiar structure of the devise in the will of *Frances Middlemore*, on which the question in that case arose, the dying "without issue" was held to be clearly restricted to a fail-

ure of issue at the time of the death of the first devisees respectively, the words being, "but it either of them dies befor the age of twenty-one years, and without issue, then," &c. which construction, it is believed, is sustained by all the decisions on like expressions, that are worthy of consideration, and they are very numerous. Relying then confidently upon the authority of the case of *Dallam vs. Dallam*, which was decided on much deliberation, for the correctness of the principles it asserts, and taking it as our principal guide, without again wading through the whole multitude of other authorities relating to the subject, but invoking to our aid such only as are thought to apply most directly to the devise in question, and examining such as are most relied upon by the counsel for the appellees, it remains only to be seen, whether the expressions used are such as import, in legal understanding, an "indefinite failure of issue," or a failure of issue "at the time of the death of the first devisees respectively." If the former, we have seen, that according to the settled rules of construction, it is a contingency too remote to support an executory devise, and that the words "without issue," when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there be nothing in the will restricting it to a failure at the time of the death of the first devisee, or to some other time or event.

In this case the limitation over to the surviving son, is, in case either of them should die, "having no lawful issue or heirs of his body," and this word "having" is supposed to convey a different meaning from the word "without," and to distinguish it from the case of a limitation over on a dying "without issue." The force of that distinction is not clearly perceived; to have no issue, is to be without issue, and to die "having no issue," and to die "without issue," seem to be convertible terms, for to die without issue, is to die without having any issue.

But without pushing this discussion, it will be found, by reference to the authorities, that the question has long since been judicially settled, and that they are held to mean the same thing. In *Sonday's* case, 9 *Coke* 127, there was a devise by a father to his son *Thomas* of a house, and "if he have no issue male," then to his son *Richard;* and the question was, "what estate did *Thomas* take?" And it was resolved that he

took an estate tail. Because, (in the language of the court) he (the father) saith, "if he hath no issue male, his son *Richard* to have it, which is as much as to say, if *Thomas* dies without issue male, which words are sufficient to create an estate tail in him. In *Forth vs. Chapman*, 1 *P. Wms.* 663, the master of the rolls cited, and relied much upon *Lee's* case, 1 *Leo.* 285, where a father devised lands to his son, "and if he should depart this life not *having* issue," then over; which was resolved to be an indefinite failure of issue. And in *Cooke vs. De Vandes*, 9 *Ves.* 197, it was held, that even in a bequest to one and the heirs of his body of a leasehold estate, with a limitation over "if he has no such heirs," the words "if he *has* no such heirs," point to an indefinite failure of issue, and the limitation over is void. And in the same case a distinction was taken between those words, and the words "and if he *leaves* no such heirs;" which latter words "and if he leaves no such heirs," were on the authority of *Forth vs. Chapman*, held to mean a failure at the time of his death, when applied to a disposition of personal property; and in *Sir Samuel Romilly vs. James*, 6 *Taunton*, 263, "having no issue of either of their bodies," &c. was held to mean an indefinite failure of issue.

It was ingeniously urged in argument, that the limitation over to the "*surviving*" son, shows what the testator intended by the words "having no lawful issue," &c. and explains and restricts them to mean a dying by the other, without issue living at the time of his death; and in support of that position the counsel relied upon *Hughes vs. Sayer*, 1 *P. Wms.* 534. *Fosdick vs. Cornell*, 1 *Johns Rep.* 440. *Jackson vs. Blanshaw*, 3 *Johns. Rep.* 292. *Moffett vs. Strong*, 10 *Johns. Rep.* 12. *Jackson vs. Stoats*, 11 *Johns. Rep.* 337, and *Anderson vs. Jackson*, 16 *Johns. Rep.* 382. *Hughes vs. Sayer*, is a case of a bequest of personal property. And here it may be proper to remark, that though in respect to dispositions of personal property, courts generally incline to the construing a limitation after a dying without issue, to mean a dying without issue at the death of the first legatee, in order to support, if they can, the limitation over, and for that purpose lay hold on any word or circumstance in the will, however slight, that may seem to afford a ground for such a construction; yet that in relation

to real estate the construction is generally otherwise; and in order to tie up and confine the generality of the words "dying without issue," to a dying without issue living at the time of the death of the party, there must be something in the will clearly showing that to have been the intention of the testator, and restricting it to that time. And so far have courts gone in support of limitations of personal property, as sometimes to draw almost imperceptible shades of distinction. In *Forth vs. Chapman*, 1 *P. Wms.* 663, where the same words, "and leave no issue," &c. in the same clause of a will making a disposition of real and personal estate, were held in relation to the real estate, to mean an indefinite failure of issue, and as to the personal estate, a failure at the death of the first taker, the Lord Chancellor said, "the reason why a devise of a freehold to one for life, and if he die without issue, then to another, is determined to be an estate tail, is in favour of the issue, that such may have it, and the intent take place; but there is the plainest difference betwixt a devise of a freehold and a term for years; for in the devise of the latter to one, and if he die without issue, then to another, the words, *if he die without issue* cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it;" and the same is said in *Target vs. Gaunt*, 1 *P. Wms.* 432.

Upon the ground of the distinctions, which courts have felt themselves authorised to take, between cases of real and personal estate, the case of *Hughes vs. Sayer* was determined, and is not, therefore, deemed applicable to this case. There the limitation over was of personal property to the survivor of two legatees, on the contingency of either of them dying without "children," and it was determined, that if the word "children" should in that case be understood as synonymous with "issue," the limitation over would be void. But that it could not be taken in that sense, (which would mean whenever there should be a failure of issue;) because the immediate limitation over, was to the survivor, and it was not probable, that if either of the legatees should die leaving issue, the survivor would live to see a failure of issue, and, therefore, the word "children," was construed not to mean "issue," but "children living" at

the time of the death of the parent. In *Hope vs. Taylor*, 1 *Burr.* 268, where there was a disposition of the whole of the testator's real and personal estate to several, with a limitation over to the survivors, if either should die without issue lawfully begotten, it was adjudged to be an estate tail in the real property, and that the limitation over of the personal estate was void being after "a dying without issue." Here we have a clear evidence of the lengths to which courts will go, and of the wire drawn distinctions that are taken in support of limitations of personal property. In both these cases, a limitation over of personal property after a failure of "issue" generally, was held to be bad; but in *Hughes vs. Sayer*, because the word "children" was used instead of "issue," it was construed to mean a dying without children at the time of the party's death. But has that case any resemblance to this? Most clearly it has not. There the limitation was of personal property, and, being also entirely personal to the survivor, (the legatee over,) unless it vested in the compass of the life of such survivor, it never could by any possibility take effect at all, there being no person beyond him, in whom it could vest. But is that this case? Here the devise is of real estate, and the limitation over, to the survivor and his heirs. It is not necessary, therefore, to give effect to the limitation over, that the survivor should be alive at the happening of the event on which it is made to depend—the failure of issue. The whole property by the devise, is to go over, on the happening of that event, to the survivor in his own person, if living, and if dead, to his heirs who would be capable of taking at whatever period of time the failure of issue might happen. *Fosdick vs. Cornell* was a case of real estate, where the devise was by a father, of different portions of his estate, to different children, in fee, with a limitation of the lands over to the survivors, to be equally divided between them, "if any of them should happen to die, without heirs male of their own bodies." *Thompson*, J. in delivering the opinion of the court, cited *Keily vs. Fowler*, *Fearne's Ex. Dev.* 236. *Pells vs. Brown*, *Cro. Jac.* 590. *Porter vs. Bradley*, 3 *T. R.* 145. *Hughes vs. Sayer*, 1 *P. Wms.* 534, and *Roe vs. Jeffery*, 7 *T. R.* 589. *Keily vs. Fowler* was referred to for the benefit of the observation of Lord Chief Justice *Wil-*

*mot*, "that he would lay hold of the most trifling circumstance to give effect to the apparent intention of the testator." But let it be observed that the question in that case arose on a bequest of personal property, in relation to which we have seen on what slight grounds courts have construed a dying, &c. without issue, to mean, without issue living at the death of the first taker. But not so in relation to real estate, where the introduction of the word "issue," &c. is supposed to be intended by the testator for the benefit of such issue, who, if there should chance to be any, might take after the father's death. But in relation to personal property, the same intention is not ascribed to the testator, for the reason assigned in *Forth vs. Chapman*, and *Target vs. Gaunt*," that in such case, the father takes the whole, which on his death, will not go to his issue, but to his executors. *Pells vs. Brown*, was decided on the force of the peculiar expressions used in the devise, "if he died without issue *living William* his brother," then to *William*, &c. which do not belong to the limitation now under consideration. *Hughes vs. Sayer*, seems to have been much relied upon. Judge *Thompson* says, in his argument, "if the reason assigned for the decision in that case be solid, it applies with full force to the one before the court; the only difference between the two cases is, that the one relates to personal, and the other to real estate." And that, with very great deference, is conceived to be a material difference, seeing the settled distinctions which have been taken between dispositions of those different descriptions of property.

There is however another difference between the two cases, I mean a difference between the particular expressions used. In *Fosdick vs. Cornell*, the words are, "without heirs male;" in *Hughes vs. Sayer*, "without children;" and it is worthy of remark, that in that very case of *Hughes vs. Sayer*, a distinction was taken between the words, "children" and "issue," in order to sustain the limitation over, on the ground, that if the word "children" was to be understood in that case, in the same sense as "issue," which meant, whenever there should be a failure of issue, the bequest over would be void, the contingency being too remote; and there too, the limitation over was to the surviving legatee. So that proceeding upon that distinc-

tion, *Hughes vs. Sayer* would rather seem to be an authority against the construction given to the devise in *Fosdick vs. Cornell.*

It has also been seen, that in *Hope vs. Taylor,* a limitation over of personal property to the "survivor" on a dying "without issue," was held to be void, as on too remote a contingency. In *Porter vs. Bradley* the words are "leaving no issue behind him;" and if it be admitted that that case was properly decided on the peculiar expressions used, yet it is a very different case from this, the words here being, "having no lawful issue," &c. It is true, that Lord *Kenyon* in his observations, went farther than the case required, and said, that if only the words "leaving no issue" had been used, and the words "behind him" omitted, they would be restrained to leaving issue at the time of the death. And denied the distinction taken in *Forth vs. Chapman,* between the effect of the same words "and leave no issue," as applied to real and personal property, in which he certainly is not sustained. Indeed afterwards in *Daintry vs. Daintry,* 6 *T. R.* 307, where the disposition was of all his real and personal estate, by a father to his son, with a limitation over to his brother, "if his son should happen to die without *leaving* issue of his body," the same judge determined, that the son took an estate tail in the real estate; but that the limitation over of the personal property was good, the contingency not being too remote; and said it was precisely like the case of *Forth vs. Chapman.* Which case of *Forth vs. Chapman* has never been shaken. In *Roe vs. Jeffery,* the devise was to *T. F.* of real estate, and his heirs, "but in case he should depart this life and leave no issue," then the house, &c. to go to *E, M* and *S,* or the survivor or survivors of them, to be equally divided between them, share and share alike. And the limitation over was held to be good by way of executory devise. "The principal reason" (says Judge *Thompson,)* "assigned for this conclusion was, that the devise over was to persons then in existence." It would seem, however, as if the point of that case, had not been attended to, for simply the devise being to persons in existence, was not the principal reason of the decision; but the limitation over being *for life,* to persons *in esse,* was the circumstance most relied upon.

No such circumstance exists here; on the contrary, the limitation over to the surviving son, is in fee. Looking to the grounds then, on which *Fosdick vs. Cornell* was decided, (and in *Anderson vs. Jackson*, we are told by Chancellor *Kent*, who was the presiding judge at the time, that *Porter vs. Bradley* and *Roe vs. Jeffery* were the guides to that decision,) we cannot yield to the authority of that case, in giving a construction to the limitation over in this will, to the surviving devisee. *Jackson vs. Blanshaw*, *Jackson vs. Stoats*, and *Anderson vs. Jackson*, are made to rest on the authority of *Fosdick vs. Cornell;* and in *Moffett vs. Strong*, the question relates to personal property. But the authorities are more than abundant to show that the circumstance of a limitation over being to a surviving devisee, has not the controling force contended for. In *Shadoch vs. Cowley*, *Cro. Jac.* 695, the devise was to *A*, and his heirs, of land in *B*, and to *C*, and his heirs, of land in *D*, and that the survivor should be heir to the other, if either died without issue. The question raised was, whether they took immediate estates tail, or contingent estates? And it was held, that they respectively took immediate estates tail, with cross remainders in fee. And the court took a distinction between such a devise, and a devise to one, and if he die without issue "in the life of another," or "before such an age." No two cases can be found bearing a closer resemblance to each other than that, and this. In *Hope vs. Taylor*, before adverted to, the limitation is in these words, "if either of the persons before named, die without issue lawfully begotten, then, &c. shall be divided equally between them that are left alive;" and *Roe vs. Scott & Smart*, 27 *Geo.* III, to be found in a note in *Fearne's Ex. Dev.* 473, is of the same character and exactly in point. It cannot be necessary to prosecute this part of the inquiry any farther.

The limitation over to the daughters, is on the contingency of both the sons dying, "*leaving* no lawful heirs of their bodies;" and it has been supposed, on the authority of *Porter vs. Bradley*, that the word "leaving," restricts it to issue living "at the death of the party," consequently that the contingency is not too remote, and that the limitation over to the daughters is good by way of executory devise. But that word "leaving,"

as well as "having," and "without," has acquired a technical judicial sense, and like them, when applied to real estate, means an indefinite failure of issue. It was so held in *Forth vs. Chapman;* but otherwise in relation to personal property, though both embraced in the same devise. In *Denn vs. Shenton, Cowp.* 410, where the limitation over was of real estate, after a dying without "leaving" issue, &c. it was held to pass an estate tail to the first taker; and the distinction, when applied to personal property, was expressly stated by Lord *Mansfield.* In *Porter vs. Bradley* it is true, Lord *Kenyon* denied that such a distinction existed, though that case was decided on its peculiar expressions. But afterwards in *Daintry vs. Daintry,* he himself adopted, and acted upon, the same distinction. And in *Tenny vs. Agar,* 12 *East,* 253, where, after a devise in fee to a son and daughter, there was a limitation over in fee, in case the first devisees "should happen to die without leaving any child or issue," it was held, that the first devisees took an estate in tail, Lord *Ellenborough* took occasion to speak rather uncourteously of *Porter vs. Bradley.*

It was further urged by the defendants' counsel, that the limitation over to the daughters, being only of a life estate, the words "leaving no lawful heirs of their bodies," must be construed to mean, *issue living at the death of the surviving son.* And that is a point not without difficulty; the question being, whether the circumstance of a limitation over, being only of a life-estate, to a person *in esse,* shall have the effect to narrow and restrict the established legal meaning of the words, "an indefinite failure of issue," to a failure at the death of the first taker? If it arose on a bequest of personal property, there would, perhaps, at this day, be little room for doubt; the word "leaving," alone, being held sufficient to restrict the limitation to a definite failure of issue, on the settled judicial distinction between cases of real and personal estate. And perhaps in such a case, that word "leaving," would derive additional force from the circumstance of the limitation over being only for life. But *Roe vs. Jeffery,* which was a case of real estate, has been cited and much relied on in support of the restricted construction contended for of this devise; and the decision in that case produces the only difficulty that is felt in this. There,

however, the word "*leave*" was chiefly relied upon in argument, as having the effect to show that the testator meant a failure of issue at the death of the first taker, on the authority of *Porter vs. Bradley*; in which the distinction taken in *Forth vs. Chapman*, (where the words are the same as in *Roe vs. Jeffery,)* between a devise of a freehold, and of a chattel interest, is rejected by Lord *Kenyon*, who said "it would be very strange if these words had a different meaning when applied to real and to personal property," and that "the distinction was not founded in law." And yet it has been seen, that afterwards in *Daintry vs. Daintry*, the same judge expressly recognized and adopted that very distinction. Notwithstanding which, he said in *Roe vs. Jeffery*, that "he was not prepared to unsay what he had said in *Porter vs. Bradley*." And although he adverted to the circumstance, that the limitation over was to persons then in existence, and that life estates only were given to them, as tending to show that the testator intended a failure of issue at the death of the first taker; yet it is clear that he did not rely upon that alone, but only called it, as a mere circumstance, in aid of the words "and leave no issue," which alone, in *Porter vs. Bradley*, he had construed to mean, issue living at the death of the first devisee; but which we have seen is contrary to all the authorities; that expression in relation to real estate, having the same established, technical import, as the words "without issue;" that is, a failure of issue whenever that may happen, without reference to any particular time or event. *Roe vs. Jeffery*, therefore, can only stand on the ground, that the circumstance of a limitation over, being of a life estate to one *in esse*, is of itself sufficient to restrict the meaning to a definite failure of issue, on the supposition that the testator must, in such a case, have so intended; because, the limitation must take effect, in the course of a life in being, if at all, a ground on which alone Lord *Kenyon* did not himself choose to rest it. And in *Denn vs. Shenton, Cowp.* 410, where the devise was to one, and the heirs of his body, and their heirs forever, and in case he should die "without leaving issue of his body," then to W. G, in fee, chargeable with the payment of one hundred pounds to A, the testator's niece, within one year after W. G, or his heirs, should

be possessed of the premises, it was held, that the first devisee took an estate tail. And Lord *Mansfield* asked Mr. *Cowper*, "if he knew of any case where, upon a dying without issue, those words had been confined to a dying without issue living at the time of the death," and said the distinction was between a devise of lands and personal estate; that in the latter case, the words were taken in their vulgar sense, that is, "dying without issue living at the time of his death;" and in the former, in a legal sense, that is, "when there is a failure of issue." And yet in that case the testator would seem to have contemplated the limitation over taking effect, within the compass of a life in being, the payment of the legacy being directed to be made to his niece then in existence, within one year after the devisee over should be possessed of the premises; which could not be, unless the contingency, on which the limitation was made to depend, happened in the lifetime of the niece. And that case looks quite as much to a definite failure of issue, as *Roe vs. Jeffery;* but the court held themselves bound by the technical legal sense of the words, and not at liberty to adopt their vulgar sense. In *Fearne's Ex. Dev.* by *Butler*, 488, and 2 *Thomas's Co. Litt.* 648, 649, *(note* c,) it is said, that an executory devise for life to one *in esse*, to take place after a dying without issue of another, "*may be good;*" and they both refer to *Lyde vs. Lyde*, 1 *T. R.* 598, and *Trafford vs. Boehm*, 3 *Atk.* 449, which are both cases of personal estate.

The distinction, as has often been observed, is between real and personal estate; and narrow as that distinction may seem to be, it is sanctioned by the different rules of law, applicable to these respective species of property. If there be a devise to one generally, of freehold and personal estates, without any words of limitation, it is very clear that he will take an estate for life only in the freehold, but the personal property absolutely; though it is most probable that in such a case the testator means to give the same absolute interest in both.

The rule is, not that the "*limitation*" over must take effect within a life in being, or not at all, but that the "*contingency*" on which it is made to depend, must happen, (if at all,) within the compass of a life or lives in being, and 21 years and a few months afterwards; and the distinction is a very clear one. As

if there be a limitation over, "*for life, to one in esse,* on the failure of issue of the first devisee, whenever that may happen." There the *event* on which the limitation is made to depend, *may* happen within a life in being; or it *may not* happen within that period, but many generations after; and yet the *limitation* being for life to one *in esse,* must take effect, if at all, within a life in being. But if the *limitation* over, be on a "dying without issue living at the death of the first taker," the *event* in which the limitation depends, (the dying without issue,) *must* happen, if at all, within the prescribed limits. The former is what is meant by an "*indefinite,*" and the latter by "a *definite*" failure of issue. And the several general expressions, "having no issue," "leaving no issue," and "without issue," when used in relation to real estate, meaning, according to the settled legal construction, an indefinite failure of issue, they must, whenever they are found in a will, be taken in their technical legal sense, unless there be something clearly demonstrating a different intention on the part of the testator, and restricting them to a failure of issue at the death of the first taker. And the circumstance in this case, of the devise over to the three daughters, being general, without words of limitation, and consequently giving only an estate for life in the premises, is not deemed sufficient to narrow down the legal import of the words "leaving no lawful heirs of their bodies," and to restrict them to mean a failure of issue at the death of the surviving brother; for *non constat,* that the testator so intended. Under that restricted construction, if *Joseph,* the surviving brother, had died leaving issue, and that issue had become extinct in one hour after his death, the daughters could never have taken the contingency on which the limitation to them was made to depend, that is, "the death of the brother without issue living at the time of his death," not having happened. And the testator could have had no conceivable motive for fixing the precise time of his son's death, as the epoch, at which the limitation to his daughters should take effect. On the contrary it would seem to have been the more probable intention, that the sons, and their posterity, if they should have any, should enjoy the property; but if they should have none, or having them, they should become extinct, then that it

should go to his daughters, (who were the next objects of his affection and benevolence,) if they should chance to be alive; and that it was the "failure of issue," and not "the mere time of his sons death," to which the testator looked in making the provision for his daughters. That failure "*might*" happen during their lives; and in the language of the Master of the Rolls, in *Barlow vs. Sotter*, 17 *Vesey* 479, that chance is what was given them. Suppose this question had been put to the testator, "if your sons should die leaving issue, and that issue should die in one month afterwards, how, in that event, do you intend your estate shall go under your will?" Would not the probable answer have been, why to my daughters surely. And yet that intention would have been defeated by the construction contended for, and the daughters never could have taken, if *Joseph* had died leaving issue, although that issue had died in one hour after his death. Whereas, according to the legal construction, that intention would be gratified, by the daughters outliving such issue.

Yielding then to the weight of authority, and construing this will according to the settled rules of construction, *Joseph* and *George Griffith*, as the law stood before the passage of the act to direct descents, took estates tail general, in the lands respectively devised to them, with cross remainders in tail general, remainder to *Sophia*, *Sarah* and *Nancy Griffith* for life.

The next question is, whether any, and what part of the lands so devised is liable for the debts of *Joseph Griffith*, the younger? which depends on the construction of the act to direct descents, (1786, *ch.* 45.) It is a matter of some surprise, that such a question should at this late day be open to discussion, and it is time that that act had received a judicial construction.

Before the passage of that act, it is very certain that estates tail were not liable for debts contracted by tenants in tail; but whether any change in that respect was effected by the operation of the act, is the question. The act provides, that if after its commencement, "any person seized of an estate in any lands, tenements or hereditaments, in fee simple, or fee simple conditional, or of an estate in fee tail to the heirs of the body generally, (created and acquired after the commencement of the act) shall die intestate thereof, such lands, tenements or heredi-

taments, shall descend to the kindred male and female of such person," in the manner therein directed. First. To the child or children, and their descendants, if any, equally, and if no child or descendant, then to the kindred *ad infinitum*, on the part of the father, in equal degree equally, and if none such, then to the kindred on the part of the mother in equal degree equally, without end; and on failure of kindred on the part both of father and mother, then it is directed to go to the husband or wife, as the case may be, and to his or her kindred, in the same manner. Thus the course of descents of estates tail general, acquired after the commencement of the act, is entirely broken, the interest of the reversioner or remainder-man destroyed, and the land made to pass by descent from the tenant in tail, precisely and in the very same course as if he was a tenant in fee simple. By the act of 1782, *ch.* 23, the ancient mode of docking estates tail by common recoveries, is abolished, and power is given to any person or persons, seized of any estate tail, in possession, reversion or remainder, to grant, bargain, sell, and convey the same, in the same manner, and by the same form of conveyance, that a tenant in fee simple may. Lands then which are held in fee tail general, created and acquired since the commencement of the act to direct descents, may not only descend, but also be sold and conveyed in the same manner as if they were held in fee simple. The idea has indeed been entertained, and in a quarter entitled to the greatest deference, (*Smith vs. Smith*, 2 *Harr. & Johns.* 314,) that the course of descents of estates tail general, is altered by the act to direct descents, only in this, that they are made to descend to all the children of the tenants in tail, and their respective issue, instead of going, in the first instance, as before, to the eldest son, on the supposition that it could not have been the intention of the legislature to change the nature of such estates in violation of the intention of those by whom they might be created, and the rights of the remainder-men; and that the provisions of the act relative to the collateral relations, are applicable only to estates in fee simple, and not to estates tail general. But it will not surely be contended, that it was not a legitimate subject of legislation, and that the legislature had no right to prohibit thereafter the creation of estates tail

altogether. And if that right be conceded, and conceded it must be, it follows, that they had a right to direct, in what manner lands, so held by subsequent creation, should descend. They have provided a course of descent, for lands held in fee tail general, created since the commencement of the act; and the inquiry is, How have they directed that such lands shall descend? With respect to the intention of the legislature, we can only judge of their intention, by what they have done. The provision of the act is, that if any person seized of an estate in any lands, &c. in fee simple, or fee tail to the heirs of the body generally, (created and acquired after the commencement of the act,) shall die intestate thereof, such lands, &c. shall descend, &c. What lands? Why lands of which any person shall die seized in fee simple, or fee tail to the heirs of his body generally; and precisely the same course of descent is directed in relation to each. It is admitted, because it cannot be denied, that lands held in tail general are made to descend immediately to all the children of the tenant in tail, and their respective issue, and not to the eldest son alone in the first instance. And what is there to be found in the act by which the descent is confined to the *issue* of the tenant in tail, to the exclusion of collaterals? Nothing surely in the letter of it, which is not equally applicable to lands held in tail general, as in fee simple. To bring in with the eldest son all the children of the tenant in tail, equally, is as contrary to the nature of an estate tail, and as much a violation of the intention of the maker, and the rights of the eldest son, as the letting in collaterals is a violation of the rights of the remainder-man. And if the legislature intended to do the former, what is there to show that it was not ther intention to do the latter? Nothing in the law itself. And if we travel out of it in search of evidence that such was not their intention, there will be found quite as much difficulty in discovering it. The truth is, that restrictions upon the descent and alienation of lands in this state were contrary to general policy, and the provisions of the act to direct descents grew out of a disposition to remove them. In that spirit the act *to direct descents* was passed; and by it all lands held in fee simple and fee tail general, are directed to descend in one general uniform manner, (without any distinction being taken

between the two kinds of estates,) first to the child or children, and their descendants, if any, equally, and if no child or descendants, &c. then to collaterals indefinitely. And if the provision for the descent to the child or children, and their descendants, applies to both, then the provision for the descent to collaterals necessarily applies also to both. The *sixth section*, excepting from the operation of the act all estates tail created before its commencement, and all estates tail special, created subsequent to its commencement, and leaving estates general, executed subsequent to its commencement, out of the exception, proves that to be the correct construction. A different construction would be repugnant to the general spirit and other provisions of the act. When lands come to be divided according to the provisions of the act, between the children of a deceased tenant in tail general, what but an estate in fee can the children respectively take? Or if found to be not capable of division, and one elects to take the whole, paying to the others their respective proportions of the valuation, what but an estate in fee can the child so electing take? Or if they cannot be divided, and neither of the persons entitled will elect to take, and they are sold under the direction of the commissioners, what but an estate in fee can the purchaser in such case take? It is also worthy of notice, that the act of descents does not direct that the *estates tail* shall descend, but that the *lands*, &c. shall descend in the manner prescribed.

Upon the whole, it is clear that all lands held in this state in tail general, created since the commencement of that act, have all the descendible properties of lands held in fee simple; and having both the transferable and descendible properties of fee simple estates, being liable to disposition by a common deed of bargain and sale, it would seem to follow that they are deviseable also. The general rule is, that what is transferable is consequently deviseable, which holds more strongly when descendible likewise. The legislature, when giving to lands held in tail general the descendible quality of estates in fee, treats them as lands capable of being devised. The language of the act is, if any person seized of an estate in any lands, &c. in fee simple, or fee tail, to the heirs of the body generally, shall die *intestate* thereof, &c. Now as a man cannot be said to

die intestate of that which is not deviseable, the legislature must be understood as meaning, that the estates tail there treated of, should by the operation of that act be deviseable; in other words, that such estates should become estates in fee simple, otherwise they could not be deviseable. If that is not what is meant, they were guilty of the absurdity of saying, that if a tenant in tail did not do, what by law he was incapable of doing, the land should descend, &c to his heirs generally. If he did not devise away an estate, which, if an estate tail he could not devise, it should, therefore, on his death, cease to be an estate tail, and become a fee simple, and as such descend to his heirs generally. The obvious understanding and intention of the legislature, in using the words "shall die intestate thereof," &c. was, that any person seized of an estate in tail general, created after the commencement of the act, might make a disposition by will of land so held, as it is not to be imagined that they were wholly ignorant of the import of the terms used, and supposed, that a dying by a tenant in tail, without leaving a will containing a provision for the disposition of the land held in tail, would be an intestacy as to such land, when by law, he was incompetent to dispose of it by will. As well may he be said to die intestate of the estate of another, who leaves no will respecting it. But if such was the understanding of the legislature, then it would follow, that they intended, that lands held in tail general, should descend in the manner directed by the *first section* of the act, in the event only of the tenant in tail omitting to do a perfectly nugatory act—the making a will, which if made would be altogether inoperative to pass the estate, and could in no manner affect the interest of the heir in tail, the remainder-man or the reversioner, more than if no will was made. Which would amount to this, that if a tenant in tail general, should make no effort by will to dispose of the estate, the land should descend immediately on his death to all his children equally; but that if he should make an unavailable effort to dispose of it, by leaving a perfectly inoperative will, then it should not so descend, but should go as formerly to the heir in tail. And what imaginable reason could there have been for that? What sense would there be in it? Why should such an effect be given to a paper purporting to be a will, but

having in law no operation at all, and amounting at most to no more than a mere ineffectual manifestation of a wish on the part of the tenant in tail to dispose of the land by will; but making in fact no disposition of it, and leaving it in the same condition as if he had died without executing such an instrument. But that is not what was meant; and the clear understanding of the legislature was, not a dying, without going through the mere form of executing an ineffectual instrument, but a dying without making a valid and operative disposition of the land by will. Thus considering and treating it as liable to be disposed of in that manner, and making no distinction between lands so held, and lands originally held in fee simple. But independent of that circumstance all estates are known by their properties, as the tree by its fruit; and that which has the properties of a fee simple, is a fee simple, and subject to all the incidents to such an estate; and lands held in tail general, created since the commencement of the act to direct descents, being made by that act to descend precisely in the same manner as lands held in fee simple, all such estates are thereby virtually abolished, and converted into estates in fee simple, drawing to such lands all the incidents to lands held in fee, among which is that of being liable for the debts of those who before that act would have been tenants in tail. Can it be doubted, that if a man so seized, should make a contract for the sale of the land, and receive the purchase money, that chancery would enforce that contract against his heirs to whom the lands would descend? And if so, on what principle can they be considered not liable for his debts? There can be no conceivable reason why a remainder-man, more than a reversioner, should be respected and protected, the interest is the same, and neither in fact is protected; and it would be strange if he who creates an estate in the form of an estate tail, and cannot protect his reversionary interest in himself, could be able to protect it, by giving it in the shape of a remainder to another. And the legislature cannot be supposed to have intended to make such estates descendible as fee simples, only for the purpose of defeating the interest of the heirs in tail, the reversioners and remainder-men, in favour of collaterals *ad infinitum*, and in the event of there being none, of husbands and wives, and their heirs, indefinitely, and yet

to give to such lands none of the other incidents of estates in fee, but leave the creditors without remedy or protection. That was not the intention of the legislature, but making them to descend as lands held in fee they meant that they should so descend, subject to all the incidents of estates in fee simple; and that the heirs, who should take them, whether lineal or collateral, should take them *cum onere*.

In this view of the subject, *Joseph Griffith*, the younger, and *George Griffith*, by operation of the act of descents, took virtually estates in fee, in the lands devised to them respectively; and on the death of *George*, *Joseph* and his three sisters surviving him, *Joseph* took by descent from him one-fourth of his estate, which, with the whole of the lands devised to him by his father, descended on his death to his three sisters as his heirs at law, subject to be sold for the payment of his debts. As to so much, therefore, of the lands devised by *Joseph Griffith*, the elder, to his sons *Joseph* and *George*, respectively, the decree of the court below is reversed.

STEPHEN, J. dissenting, delivered the following opinion. The question to be decided in this case arises from sundry devises contained in the will of *Joseph Griffith*, who in his lifetime being seized in fee of sundry lands and tenements lying in *Dorchester* county, on or about the 6th of February 1792, made and published his last will and testament according to law, and therein, among other dispositions of his estate, devised his said lands to his two only sons, *Joseph* and *George Griffith*, and his three only daughters, *Sophia*, *Sarah* and *Nancy Griffith*, as follows, to wit: "I give and devise unto my son *Joseph Griffith* my present dwelling plantation whereon I now live, to him my said son *Joseph*, his heirs and assigns forever. *Item*. I give and devise unto my son *George Griffith* the plantation whereon *Levi Oram* now lives, lying on *Transquakin* river, or a branch thereof, to him, my said son *George*, his heirs and assigns, forever; and my will is, that all the land which I am now possessed of, either by deed, bond or patent, be equally divided between my said two sons *Joseph* and *George*, according to quantity and quality, share and share alike, to them their heirs and assigns forever; and in case ei-

ther of my said sons should decease, having no lawful issue, or heirs of his body, that then the surviving son to have his deceased brother's part or moiety of the land aforesaid, to him, his heirs and assigns forever, as aforesaid; and in case both my said sons *Joseph* and *George*, should decease, leaving no lawful heirs of their bodies, that then and in such case, I give and devise all my aforesaid lands, devised as aforesaid, unto my three daughters, *Sophia*, *Sarah* and *Nancy Griffith*, to be equally divided between my aforesaid three daughters." *George Griffith*, after the death of his father, departed this life intestate, and without issue, never having had any issue, leaving his brother and sisters surviving him. *Joseph Griffith* also departed this life intestate, and without issue, never having had any issue, leaving his sisters surviving him, all of whom are married and in possession of the premises. *Joseph Griffith*, the son, died indebted to sundry persons, and did not leave personal estate sufficient to pay his debts. His creditors filed a bill on the equity side of *Dorchester* county court against the daughters, and their husbands, for the purpose of obtaining a decree for the sale of the said lands, to pay their debts. A decree passed *pro forma* in favour of the respondents, from which the complainants appealed to this court. The questions to be decided by this court are *first*, What estates the sons took under the will of their father? And *secondly*, Did they derive under that will such an interest in the lands devised to them, as will subject those lands, under the circumstances of this case, to the payment of *Joseph's* debts? It is a well settled rule in the exposition of wills, that the intention of the testator, to be collected from the whole will, shall prevail unless it conflicts with some established principle of law; and as Lord *Kenyon* said in the case of *Wilkinson vs. South*, 7 *T. R.* 553, the only question is, whether on the fair construction of the words of this will, the testator meant that the limitation over to the surviving son should only take effect after an indefinite failure of issue of the first taker, or on a failure of issue living at the time of his death? For, he observes, as soon as that intention is discovered, there is an end of the case. So in the case of *Roe vs. Jeffery*, *Ibid* 591, his Lordship says, speaking on the subject of executory devises, "We had occasion a few days ago

to advert to this doctrine, when we said that this is a question of construction, depending on the intention of the party; and nothing can be clearer in point of law, than that if an estate be given to A in fee, and by way of executory devise an estate be given over which may take place, within a life or lives in being, and twenty-one years and the fraction of a year afterwards, the latter is good by way of an executory devise. The question therefore in this and similar cases is, whether from the whole context of the will we can collect, that when an estate is given to A and his heirs forever, but if he die without issue then over, the testator meant dying *without issue living at the death of the first taker?*" If the latter was intended in the case now before this court, the limitation over is within the legal limits, and good and available as an executory devise according to the law as settled in the above case. And it is further to be remarked that where it is the apparent intention of the testator to give a fee in the first instance, and there is then a limitation over on a failure of issue, to carry the intention of the testator into effect, the court will lay hold of the smallest circumstance to confine the failure of issue to the death of the first taker, so as to make the limitation over good as an executory devise. In the case last referred to, the devise was to T. F. and his heirs forever, and in case he should depart this life, and leave no issue, then to E, M and S, or the survivor or survivors of them, share and share alike; it was held that the devise to E, M and S, was a good executory devise. The reason upon which this decision was grounded, is strongly nay irresistibly decisive of the case now pending before this court. It was, that the persons to whom the property was limited over, were then in existence, and life-estates only were given to them. So here the daughters of the testator, *Joseph Griffith*, were in existence at the time he made his will, and life-estates only were given to them; and this fact strongly indicates the intention of the testator to confine the failure of issue to the death of his two sons; because the limitation over to the daughters was only to take effect on the death of both without leaving issue. The case of *Fosdick vs. Cornell*, 1 *Johns. Rep.* 440, is in principle strongly analagous to the present. The first devises were in fee, and the will provided that if any of the devisees should happen to

die without heirs male of their own bodies, that then the lands should return to the survivors, to be equally divided between them. Judge *Thompson*, in delivering the opinion of the court, remarks, "This is a question of construction, depending on the intention of the testator; and from the whole will taken together, I cannot entertain a doubt that he meant to provide, that in case any of the devisees, named in the clause, should die without leaving male issue at the time of his death, his portion should be divided among the survivors." The limitation over being to the survivors, seems to have had considerable weight in bringing him to the conclusion, that it was good by way of executory devise, it restraining the failure of issue to the time of the death of the first taker. The case of *Jackson vs. Blanshaw*, 3 *Johns. Rep.* 292, is strongly analagous to the case now before this court, or more, properly speaking, is a case in point, and decides the question which now awaits the determination of this tribunal. After giving some legacies, the testator devised to his six children their heirs and assigns forever, all the remainder of his real and personal estate, to be equally divided among them; but if any one of his children should die before full age, or without lawful issue, then his or her part to devolve upon, and be equally divided among the rest of his surviving children, to their heirs and assigns forever. In that case *Spencer*, Justice, in delivering his opinion, says, "The grandchildren cannot be considered as the surviving *children* within the intention of the testator." So in this case, the surviving son cannot be considered as the surviving grandson within the intention of the testator; and if not, then the limitation over to the surviving son, though in fee, is clearly good as an executory devise, and within the legal limits which the law indulges to a man's last will and testament in such cases. If then the devise over to the surviving son was good as an executory devise, *Joseph*, the son, did not take an estate tail, but took a defeasible fee, in the part devised to him by the will, and on the death of *George* without issue took the same estate in the part devised to *George;* and on *Joseph's* death without issue, the whole estate went over to the surviving daughters by way of executory devise for life. *Wooddisson*, in his lectures on executory devises, 225, says, there are two

sorts of executory devises, one where the fee-simple passes, another where the fee does not pass, but in the interim descends to the heirs. The example of the first sort which he gives is, where a testator devised to A, and his heirs forever, and if he died without issue living B, then B to have those lands, to him and his heirs forever; and, he says, it was adjudged that A took a vested fee simple. In this case, then, on the death of *George*, without issue, the whole fee simple in the lands devised vested in *Joseph:* and it was only on his death without issue that his right to the whole fee ceased; on that event the testator devised the lands to his daughters for life, leaving the fee undisposed of; but the daughters being then his heirs at law, the fee descended to them, and the life estates became merged in it. For it was only on the death of *Joseph*, without issue, that there was any interest or estate to vest in the heirs of the testator, the whole fee simple being in him during his life. According to this view of the subject the decree of *Dorchester* county court ought to be affirmed. No estate tail being given to *Joseph Griffith* by the will of his father, it is unnecessary to decide whether, if he had taken such an estate, it would have been liable, on his death, to the payment of his debts, under our act of assembly regulating the law of descents. The question is a highly important and novel one. In *Davis vs. Jacquin & Pomerait*, 5 *Harr. & Johns.* 109, this court in construing the law giving to females a right to possess their property at the age of sixteen, express themselves in the following manner: "That this act (1798, *ch.* 101,) has not in terms declared, that the infancy of females shall cease at the age of sixteen, will be admitted; and it is difficult to conceive why the legislature, if they intended to destroy this important feature of the common law, did not pointedly declare their intention, instead of leaving it to be inferred by reasoning." So here no part of the act of descents declares in terms, that an estate tail shall on the death of tenant in tail be liable for the payment of his debts, but only declares that it shall be descendible as a fee simple. If it had been the intention of the legislature to make so important a change in the law relative to estates tail, it is to be presumed they would have declared such intention in express terms, and not leave it to be collected

from argumentative inference or deduction. It has moreover been, it is believed, the universal understanding, that estates tail were not liable for the debts of tenant in tail; and the practice has been to dock such estates in the manner prescribed by the act of 1782, *ch.* 23, as well since and before the act of descents. This last mentioned act speaks of the tenant dying seized of an estate tail, intestate thereof; recognising the continuance of the entail to the time of the tenant's death, and giving it only the properties of an estate in fee, as to the course and manner of its descent after his death. In 1 *Bacon's Abridgment*, 703, the law is stated to be, that the estates of copyholders shall descend to their heirs, and such descent shall be governed by the rules of the common law, but not to have all the collateral qualities of estates in fee simple; for it is not assets in the heirs hands; so that the circumstance of the lands being made descendible to the heirs general, in the same manner as fee simple estates, is not, it seems, sufficient *per se* to make them liable in the hands of the *heirs* for the debts of the ancestor. But that lands held in fee tail general, have not all the qualities and attributes of estates in fee simple, it is only necessary to refer to the act of 1798, *ch.* 101. That act declares that all lands which might pass by deed, or which would in case of intestacy, descend to or devolve on "his or her heirs, or other representatives," except estates tail, may be disposed of by last will and testament. The Supreme Court of the *United States*, in *Stuart vs. Laird*, 1 *Cranch*, 309, in speaking of the effect of a practice under a law, say, that practice and acquiescence under it for a period of several years, fixes the construction. It is a contemporary interpretation of the most forcible nature. Such a practical exposition is too strong and obstinate to be shaken or controled. That such a construction puts the question at rest, and that it ought not to be disturbed. So here the long understanding and practice under the act of descents, puts the question at rest, and it ought not now to be disturbed. I am of opinion that the decree ought to be affirmed.

DECREE REVERSED, *(a.)*

*(a)* The doctrine that "if there be a devise to one generally of freehold, without any words of limitation, he will take an estate for life only

in the freehold," is changed in this state by the act of 1825, *ch.* 119, by which it is enacted, that after the 1st of April 1825, devises of land or real property, without words of perpetuity or limitation, shall pass the entire estate of the testator in such property, unless it shall appear by devise over, or by words of limitation, or otherwise, that the testator intended to devise a less estate.

## HIGDON *et ux. vs.* THOMAS.—June, 1827.

A liberal construction is to be given to the Statute of Frauds. 29 *Car.* II, *ch.* 3. In relation to the *fourth* section thereof, it is settled, that if the name of a party appears in the memorandum of a contract, and is applicable to the whole substance of the writing, and is put there by him or his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Forms are not regarded, and the Statute is satisfied, if the terms of the contract are in writing, and the names of the contracting parties appear.

So a bond, which recited the names of the parties to, and the terms of a contract for the sale of land, and contained a condition to secure a performance of such contract, prepared and written by the vendee, who was also the obligee of the bond, executed by an agent of the vendor, and delivered by him to the vendee, is a sufficient signing within the *fourth* section of the Statute of Frauds.

A technical authentication by signature is not necessary.

The phraseology of the *fourth* and *fifth* sections of that statute, as respects signing, is equally imperative, and substantially the same.

A receipt for the purchase money, in a deed for the conveyance of land, is only *prima facie* evidence of its payment.

Where an agreement does not designate the person to whom its consideration is to be paid, the law will raise an *assumpsit*, and this is always implied in favour of those who are the meritorious cause of action, or from whom the consideration moves.

The consideration being the sale of the wife's inheritance, in the absence of an express promise the law will raise one to the husband and wife, on which the husband may sue either in his own name, or in the names of himself and wife, and in such case, even if there was an express promise to the husband, the wife might be joined as plaintiff.

But a *feme covert* cannot be joined in an action to recover the price of property sold by her, and which belonged to her before coverture, or the value of services by her personally rendered, unless there be an express promise of payment to her. This distinction arises from rights which pass to the husband absolutely, and those which survive to the wife, and over which he has no power of transfer but by the consent and co-operation of the wife.

APPEAL from *Frederick* County Court. This was an action of *assumpsit* brought in the names of the appellants, (the plaintiffs in the court below,) against the appellee, (the defendant in

that court.) The declaration counted upon the contract recited in the bond, a copy of which will be found in the bill of exceptions; and also averred that the defendant was put into the possession of the land sold to him on the day of making such contract, and afterwards accepted from the plaintiffs a sufficient deed conveying the fee simple of the said land to him. It then assigned as a breach, the nonpayment of the four last instalments mentioned in the contract, and concluded to the damage of the plaintiffs, &c. The defendant pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiffs gave in evidence the following instrument of writing, to wit: "Know all men by these presents, that I, *John S. Frazier*, of *Frederick* county, and state of *Maryland*, farmer, am held and firmly bound unto *Samuel S. Thomas*, of the same place, in the just and full sum of eight thousand dollars current money of *Maryland*, to be paid to him the said *Samuel S. Thomas*, his executors, administrators or assigns; to the which payment, well and truly to be made, I bind myself, my heirs, executors, administrators and assigns, in and for the whole, firmly by these presents. Sealed with my seal, and dated this tenth day of February eighteen hundred and thirteen. Whereas the said *John S. Frazier* hath been authorised by *Thomas Higdon*, of *Nelson* county, in the state of *Kentucky*, to contract with persons for the sale of his lands lying in *Frederick* county aforesaid, which he the said *Higdon* holds by virtue of his intermarriage with *Artemesia*, daughter and devisee of *Sarah Briscoe*. And whereas the said *John S. Frazier*, in pursuance of his said authority, contracted with the said *Samuel S. Thomas* for the sale of all the said *Thomas Higdon* and *Artemesia*, his wife's right, title, property, claim and interest whatsoever, legal and equitable, to all the land situate, lying and being, in *Frederick* county aforesaid, which they hold under the last will and testament of *Sarah Briscoe*, deceased, except so much thereof as lies in and near *Liberty-Town*, for which the said *Samuel S. Thomas* is to pay the sum of four thousand dollars current money, in the following manner; that is to say, one thousand dollars on the execution of this instrument of writing, one thousand in July next, and five hundred dollars annually thereafter, until the said four thousand

dollars be fully paid. The said *John S. Frazier* is to procure from the said *Thomas Higdon*, and his wife, deed for the above described lands, except as before excepted, investing him the said *Samuel S. Thomas*, his heirs, executors or assigns, with a good title in fee simple for the same, and is to have possession now; all suits that are now or may be hereafter brought, which may affect the title or possession of said land, and the necessary costs thence accruing, is to be paid out of the latter payments. Now, the condition of the above obligation is such, that if the above mentioned *Thomas Higdon* and *Artemesia* his wife, do and shall well and truly, by a good and sufficient deed, agreeable to the terms and agreement aforementioned, convey to the said *Samuel S. Thomas*, his heirs, executors and administrators, all the lands above described, except as before excepted, on or before the twentieth day of September next, then the above obligation to be void, otherwise of full force and virtue. *John S. Frazier*, Att'y (Seal.)

Signed, sealed and delivered, in presence of *Wesly Philips*, *Ignatius* M'*Attee*.

Received this 10th day of February, 1813, of *Samuel S. Thomas*, the sum of one thousand dollars, current money, in part payment of the above contract.

Pr. me *John S. Frazier*, Att."

The plaintiffs also gave in evidence, that the said instrument was prepared and written by the defendant, and by him brought to *John S. Frazier*, for the purpose of procuring his *John S. Frazier's* signature to the same; that *John S. Frazier* did, in the presence of the defendant, sign, seal and deliver, the said instrument of writing, to the defendant. The plaintiffs also gave in evidence, that the defendant, on the 10th of February 1813, immediately after the execution of the said instrument of writing, and in pursuance thereof, was put into the possession of the lands mentioned in the said writing, by the said *Frazier*, and is still in possession of the same, and that the defendant on that said day, to wit, the 10th of February 1813, paid to the said *Frazier*, one thousand dollars. The plaintiffs also gave in evidence a deed dated the 9th of August 1813, executed by them to the defendant for the lands so contracted by the plaintiffs to be conveyed to the defendant. Which deed was made

in consideration of the sum of $4,000 to the said *Higdon* and wife, paid before the sealing and delivery thereof, the receipt whereof they thereby acknowledged, and was prepared at the instance of the defendant; and that the said deed after its execution, was delivered to, and accepted by the defendant, as a good and sufficient deed, and that the defendant, at the time of his acceptance thereof, said he wanted no other deed. The plaintiffs also gave in evidence another deed for the same lands, bearing date the 12th of April 1814, executed by the plaintiffs to the defendant.

After the above evidence was read and given to the jury, the plaintiffs closed their case. The defendant then prayed the opinion and direction of the court to the jury, that upon the evidence offered by the plaintiffs, they are not entitled to recover; which opinion the Court, [*Shriver*, A. J.] gave, and so directed the jury. The plaintiffs excepted; and the verdict being for the defendant, they appealed to this court.

The cause was argued at the last June term before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Ross*, for the Appellants, contended, that the bond of *John S. Frazier*, the agent of the plaintiffs below, dated the 10th of February 1813, was sufficient evidence,

1. Of an agreement in writing, and signature by the party, or his agent, to gratify the Statute of Frauds. To prove this position, he cited 1 *Pow. on Cont.* 286, 287. *Ogilvie vs. Foljambe*, 3 *Meriv.* 61. *Kennedy vs. Lee, Ib.* 447, 448, 449, 450. *Coles vs. Trecothick*, 9 *Ves.* 250. *Clark vs. Wright*, 1 *Atk.* 13, *(note* 1.*)* *Welford vs. Beazely*, 3 *Atk.* 504. *Ballard vs. Walker*, 3 *Johns. Cas.* 65. *Clason vs. Bailey*, 14 *Johns. Rep.* 484, 486. M'*Comb vs. Wright*, 4 *Johns. Ch. Rep.* 663. *Batturs vs. Sellers & Patterson*, 5 *Harr. & Johns.* 119. It is not necessary that the agreement should be in writing; but the evidence of it must be in writing. *Randall vs. Morgan*, 12 *Ves.* 71. The bill of parcels is not to be considered as the contract itself; but it is a sufficient memorandum in writing of the contract within the meaning of the Statute of Frauds. *Batturs vs. Sellers & Patterson*, 5 *Harr. & Johns.* 120. If a letter contains the terms of an agreement, or acknowledges or refers to a former written one, then it takes it out of the Statute

of Frauds. *Clerk vs. Wright*, 1 *Atk.* 13, *(note* 1.*)* Where there is a complete agreement in writing, and a person who is a party, knows the contents, subscribes it as a witness only, he is bound by it; for it is a signing within the statute. *Welford vs. Beazely*, 3 *Atk.* 504. Where A drew up a note of the agreement in writing, which B signed, but A did not sign, it was decreed the agreement of both; for A's drawing up the agreement in his own hand, and procuring B to sign it on his part, made the signing of B, not only a signing for himself, but also a signing as authorised by A to close the agreement. And if B had come into a court of equity against A, the court would have decreed the agreement against him. 1 *Pow. on Cont.* 287. This case was decided soon after the passage of the Statute of Frauds The construction of the Statute of Frauds is the same in equity as at law; indeed the court of equity professes to follow the law. *Morrison vs. Turnour*, 18 *Ves.* 183. *Sudg.* 6. *M'Comb vs. Wright*, 4 *Johns. Ch. Rep.* 666. Forms are not regarded; and the statute is satisfied if the terms of the contract, and the names of the contracting parties, appear in the memorandum. *Coles vs. Trecothick*, 9 *Ves.* 252. *Morrison vs. Turnour*, 18 *Ves.* 180, *(note* 1.*)* *Clason vs. Bailey*, 14 *Johns. Rep.* 486. *Kennedy vs. Lee*, 3 *Meriv.* 447. *Batturs vs. Sellers & Patterson*, 5 *Harr. & Johns.* 119. As to the effect of the insertion of the name in the body of an agreement, as a signature within the Statute of Frauds, see *Batturs vs. Sellers & Patterson*, 5 *Harr. & Johns.* 119. *Clason vs. Bailey*, 14 *Johns. Rep.* 487, and the cases there cited. In the construction of all contracts, the situation of the parties, and the subject matter of the contract, are to be considered, in order to determine the meaning of any particular provision. *Wilson vs. Troup*, 2 *Cowen's Rep.* 196. By this rule let the question be decided, whether Mrs. *Higdon* was not a party to the contract.

2. That *Artemesia*, the wife, was not improperly joined in the action as one of the plaintiffs, he cited 1 *Chitty's Plead.* 19, 20. *Bashford vs. Buckingham*, *Cro. Jac.* 77, 205. *Guy vs. Livesey*, *Ib.* 501. *Aleberry vs. Walby*, 1 *Stra.* 229. *Bidgood vs. Way & Wife*, 2 *W. Blk.* 1239. *Ord vs. Fenwick*, 3 *East*, 106. *Philliskirk & Wife vs. Pluckwell*, 2 *Maule &*

*Selw.* 393. *Arnold vs. Revoult*, 5 *Serg. & Low.* 141. *The State vs. Krebs*, 6 *Harr. & Johns.* 37. *Reeves Dom. Rel.* 60, 61, 131, 132, 133.

*Palmer*, for the Appellee. 1. The evidence does not support the issue. 2. The receipt in the deed is *prima facie* evidence of payment. 2. There is a misjoinder of husband and wife in the action. It should have been in the name of the husband alone.

1. The action is brought on a contract recited in a bond given to the defendant below. There is a distinction between referring to a contract in a bond, and the contract itself. Some of the counts in the declaration set out a contract different from that recited in the bond. *Higdon* and *wife* were not bound to make the deed under the agreement made by *Frazier*. The wife was not bound by the contract either at law or in equity. *Bingh. on Infancy*, 300. *Emery vs. Wase*, 5 *Ves.* 848. *Sedgwick vs. Hargrave*, 2 *Ves.* 57. The contract cannot remain partly by writing, and partly by parol. *Stat. Frauds*, 29 *Car.* II, *ch.* 3, *s.* 4, 17. *Parkhurst vs. Van Cortlandt*, 1 *Johns. Ch. Rep.* 273, 282. The recital of the contract in the bond is not the best evidence which the nature of the case admitted of. The contract itself should be produced. *Phill. Evid.* 356. *Johnson vs. Mason*, 1 *Esp. Rep.* 89. *Shelley vs. Wright*, *Willes*, 11 *Stroughton vs. Lynch*, 2 *Johns. Ch. Rep.* 222. The writing the name in the bond reciting a contract, is not a signing within the Statute of Frauds. *Rob. on Frauds*, 121. *Glynn vs. Bank of England*, 6 *Ves.* 39. *Jackson vs. Pierce*, 2 *Johns. Rep.* 221.

2. The receipt in the deed is *prima facie* evidence that the money has been paid. *Dixon vs. Swiggett*, 1 *Harr. & Johns.* 252. The receipt in the deed operated as an estoppel.

3. As to the misjoinder of the wife in the action, he cited 1 *Chitty's Plead.* 18, 22, 314. *Bingham on Infancy*, 300. *Sedgwick vs. Hargrave*, 2 *Ves.* 57. *Emery vs. Wase*, 5 *Ves.* 848. *Hall vs. Hardy*, 3 *P. Wms.* 189, *Innes vs. Jackson*, 16 *Ves.* 367. 1 *Madd. Ch.* 6. *Campbell vs. Jones*, 6 *T. R.* 570. *Pordage vs. Cole*, 1 *Saund.* 320, *(note* 4.) *Buckley vs. Collier*, 1 *Salk.* 114. *Bashford vs. Buckingham*, *Cro. Jac.*

77. *Bidgood vs. Way & Wife*, 2 *W. Blk.* 1236. *Yard vs. Ellard, Carth.* 462. 3 *Thomas's Co. Litt.* 312, *(note.) The State use of Rogers vs. Krebs*, 6 *Harr. & Johns.* 37.

*Ross*, in reply, as to the point that the receipt in the deed was conclusive evidence of the payment of the consideration therein expressed, cited *Shephard vs. Little*, 14 *Johns. Rep.* 210. *Bowen vs. Bell*, 20 *Johns. Rep.* 338. *Hamilton vs. M'Guire*, 3 *Serg. & Rawle*, 355. *Weigley's Admr. vs. Wier*, 7 *Serg. & Rawle*, 309. *Wilkinson vs. Scott*, 17 *Mass. Rep.* 257. *O'Neale vs. Lodge*, 3 *Harr. & M'Hen.* 433.

*Curia adv. vult.*

DORSEY, J. at this term delivered the opinion of the Court. It being conceded in argument, (as is unquestionably settled by authority,) that the receipt in a deed, for the conveyance of land, is only *prima facie*, and not conclusive evidence of the payment of the purchase money; in determining this cause, two questions only are necessary to be considered; and these, it must be admitted, are neither free from difficulty nor doubt.

Has the defendant signed a note or memorandum in writing of the agreement, as required by the statute of 29 *Car.* II, *ch.* 3? is the question which first presents itself. The nature of the requisite signature, in cases analogous to that now before us, although again and again examined and discussed in *England*, and elsewhere, does not appear heretofore to have been the subject of judicial scrutiny in this state. In *Lemayne vs. Stanly*, 3 *Lev.* 1, among the first cases upon the subject which arose after the statute, and which occurred only four years from its passage, after several arguments it was adjudged, that a will of lands in fee, in the handwriting of the testator, beginning "In the name of God, Amen. I *John Stanley* make this my last will and testament," &c. not subscribed by the testator, but subscribed by three witnesses in his presence, was a good will. "For (in the language of the court,) being written by himself, and his name in the will, 'tis a sufficient signing within the statute, which does not appoint where the will shall be signed, in the top, bottom or margin, and therefore a signing in any part is sufficient." This case turned on the construction of the *fifth*

section of the Statute of Frauds. The case before us depends on the intrepretation of the *fourth* section, but the phraseology of both sections, as respects signing, is equally imperative, and substantially the same. In *Knight vs. Crockford*, 1 *Esp. Rep.* 190, the doctrine of *Lemayne vs. Stanley* is established in a case arising under the *fourth* section. At the trial the plaintiff produced a memorandum of the agreement, beginning "I *James Crockford*, agree to sell," &c. but signed only by the plaintiff, and witnessed by one *Mills*. On the objection that the agreement was void within the Statute of Frauds, as not being signed by the defendant, it only beginning "I *James Crockford* agree," &c. and not having his name subscribed to it, *Eyre*, Chief Justice, held "that the agreement contained a sufficient signing within the Statute of Frauds, by beginning in the defendant's own handwriting, "I *James Crockford* agree," &c. In *Bawdes vs. Amherst*, 1 *Eq. Ca. Ab.* 21, Lord Chancellor *Cowper* said, "he knew of no case where an agreement, though wrote by the party himself, should bind, if not signed, or in part executed by him;" adding, that the agreement was susceptible of alterations or additions, and might have been entirely broken off.

Alterations made by the defendant in his own handwriting in the draught of an agreement, and a delivery thereof to an attorney to be engrossed, were held not to be a signing within the statute, in *Hawkins vs. Holmes*, 1 *P. Wms.* 770. In reply to the argument of the plaintiff's counsel on the plea of the Statute of Frauds and Perjuries, Mr. *Williams* answers, "that the statute requires that the party, or some person by him lawfully authorised, should sign the writing; and though the defendant had altered the draught with his own hand, yet this could not be called a signing; that the statute requires signing as a material circumstance, which is not to be dispensed with in equity any more than at law; that if the defendant had himself wrote over the whole deed with his own hand, without signing it, this had not been sufficient; for the statute has made signing absolutely necessary for the completion of the contract; for which purpose I cited the case of *Ithel vs. Potter.*"

Referring to the case of *Hawkins vs. Holmes*, 1 *P. Wms.* 770, and *Ithel vs. Potter*, as there cited, *Sugden*, in his valua-

ble treatise upon the Law of Vendors, 55, (73,) states, that "the mere altering the draft of the conveyance will not take a case out of the statute; neither will the writing over of the whole draft by the defendant with his own hand, be sufficient, as there must be a signature. To this rule (he adds,) we may perhaps refer the case of *Stokes vs. Moore*, 1 *Cox*, 219, where the defendant wrote instructions for a lease to the plaintiff, in these words, viz. "The lease renewed; Mr. *Stokes* to pay the King's tax; also to pay *Moore* £24 a year, half yearly; Mr. *Stokes* to keep the house in good tenantable repair, &c. *Stokes*, the lessee, filed a bill for a specific performance, and the court of exchequer held it not to be a sufficient signing, to take the agreement out of the statute;" although it was not necessary to decide the point. In *Stokes vs. Moore*, the Lord Chief Baron, in delivering his opinion says, "this is no formal signature of the defendant's name, and the question is, whether so inserted and written by the defendant, is a sufficient signing? The purport of the statute is manifest, to avoid all parol agreements, and that none should have effect but those signed in the manner therein specified. It is argued that the name being inserted in any part of the writing is a sufficient signature. The meaning of the statute is, that it should amount to an acknowledgment by the party, that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires." In the same case and to the same effect is Baron *Eyre* equally explicit. "The signature, (says he,) is to have the effect of giving authenticity to the whole instrument; and if the name is inserted so as to have that effect, I do not think it signifies much in what part of the instrument it is to be found; it is perhaps difficult, except in the case of a letter with a postscript, to find an instance where the name inserted in the middle of a writing, can well have that effect; and there the name being generally found in a particular place by the common usage of mankind, it may very probably have the effect of a legal signature, and extend to the whole; but I do not understand how a name inserted in the body of an instrument, and applicable to particular purposes, can amount to such an authentication as is required by the statute." The case, however, was decided on the ground, that the memorandum was

not the whole or final agreement between the parties. *Roberts*, in his treatise on the Statute of Frauds, 121, in commenting on the *signing* required by the statute, tells us "the place of the signature seems not to have been regarded as of much importance. If the name is inserted in any part of the instrument, it may operate as a signing under the Statute of Frauds; but then it must have been inserted for the clear and only purpose of giving authenticity to the instrument." The same principle is sanctioned by *Sugden*, in his Law of Vendors 56, (74;) and is recognized in *Ogilvie vs. Foljambe*, 3 *Merivale*, 52, in which the Master of the Rolls states, "it is admitted, that provided the name be inserted in such manner as to have the effect of authenticating the instrument, the provision of the act is complied with, and it does not much signify in what part of the instrument the name is to be found."

If the correctness of this general rule be admitted, for the establishment of which it must be confessed that the authorities, herein before referred to, are of the most imposing character, it cannot be contended, that the writing, upon which this action is founded, takes the case without the statute, as in no part of it is the name of the defendant written for the purpose of giving it authenticity, or acknowledging it to be genuine. But if these authorities be minutely and separately examined, they are not of that conclusive nature, which might be ascribed to them on a more superficial examination. The cases of *Lemayne vs. Stanley*, and *Knight vs. Crockford*, simply show, that a technical or formal signature is not requisite, and that a will or agreement without the subscription of the party making it, commencing, "I, A B," &c. if in his own handwriting, is sufficiently signed. Nothing is said ot any general rule by which cases ot this nature are to be tested.

The doctrine of Lord Chancellor *Cowper*, in *Bawdes vs. Amherst*, if received with the meaning usually ascribed to it, viz. that a formal signature is necessary, is contradicted by *Lemayne vs. Stanley*, *Knight vs. Crockford*, *Saunderson vs. Jackson, and another*, 2 *Bos. & Pull.* 238, and *Ogilvie vs. Foljambe*; and is denied to be law by Lord *Hardwicke* in *Welford vs. Beazely*, 3 *Atk.* 503, and its repudiation has been sanctioned by all subsequent writers upon the subject.

*Hawkins vs. Holmes* differs from the present case in many essential particulars. There the instrument was in the handwriting of a stranger to the contract, and not of the party against whom it was attempted to be enforced. It does not appear, (nor, from the nature of the transaction is it at all probable that it were so,) that the writing of his own name was any part of the alterations made; nor if it were, that it was so inserted as to govern or be applicable to all the provisions of the contract.

*Ithel vs. Potter* not being reported, we know not that its facts bore any analogy to those now under consideration. 'Tis true Mr. *Sugden* understood Mr. *Williams* as asserting, that in *Ithel vs. Potter* it was determined, that the writing over the whole draft by the defendant, with his own hand, will not be sufficient. But the language of Mr. *Williams* would bear, and is perhaps grammatically more susceptible of a different interpretation, viz.—that the only purpose for which *Ithel vs. Potter* was cited, was as establishing the immediately preceding legal position, that "the statute has made signing absolutely necessary for the completion of the contract;" and that the assertion of Mr. *Williams*, that the writing over the whole draft by the defendant, with his own hand, will not be sufficient, was an inference of counsel by way of argument, supposed to be deducible from the decision in *Ithel vs Potter*, that signing was absolutely necessary. At all events an equivocal statement of a case, in the argument of counsel, which has never been reported, is an authority of the most feeble character.

The bearing of the decision in *Stokes vs. Moore* is certainly not so easily obviated; as the similitude of that case to the one now before us, is much greater than that of any other of the cases herein before referred to. But of the doctrine in that case Lord *Eldon* is reported to have said he had some doubt. (*Vide Sug. Ven.* (55,) 73.) It may also be added, that the decision is in the nature of an *obiter dictum*, as the decree was pronounced, and bill dismissed, on the ground that the memorandum did not contain the whole or final agreement between the parties. Admit, however, the decision to be correct, and made too because the signing was not sufficient, it does not set-

tle the question now in controversy; the name, as there inserted, was only applicable to particular purposes, and did not necessarily connect itself with, and operate on every other part of the agreement. In *Ogilvie vs. Foljambe*, the Master of the Rolls, in a part of his opinion, sanctions the inference, that he did not use the word authenticating in its usual literal import, but in a sense entirely consistent with the plaintiff's right to recover.

This general rule, as to what must be the object in writing the name, which is necessary to constitute a signing within the statute, is of modern origin, and first presents itself in *Stokes vs. Moore*, decided in 1786; and is afterwards adopted by *Sugden* and *Roberts*, and by Sir *Samuel Romilly* in arguing the case of *Morrison vs. Turnour*, 18 *Ves.* 180, in which he states, that "a man thus describing himself in the third person, has never been decided to have signed within the act of parliament, which requires a signature as attesting what he has written. It is not necessary to sign it as an agreement; but he must sign. In the instance of the will, the name though in the beginning, authenticated the whole instrument, as that by which the testator meant to abide as his will, which is very different from a name occurring in the third person."

The object of the statute being to substitute written for oral evidence, and thereby prevent frauds, and perjuries, its almost contemporaneous exposition, in *Lemayne vs. Stanley*, announces to us, that a liberal and free construction is to be given to it; that substance, and not form, amounts to a compliance with its provisions, that if the name of a testator appear in any part of a will written by himself, it is sufficiently signed. The same principle is recognized in *Knight vs. Crockford*, and in *Welford vs. Beazely;* in deciding the latter of which cases the words of Lord *Hardwicke* are "the meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other; and therefore, both in this court, and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on." Can it then be denied, that such object of the statute is as completely gratified, as much certainty attained by the agreement here relied on, as if it had been

written in the first instead of the third person? It is not a refinement upon subtlety, a total sacrifice of substance to form, to say, that if the agreement had commenced, "Whereas I, *Samuel S. Thomas*, have purchased of *John S. Frazier*," &c. the signature is complete, the objects of the statute have been accomplished, and the contract is available; but if it commences, as it does here, "Whereas *John S. Frazier* hath contracted to sell to *Samuel S. Thomas*," &c. there is is no signing, the provisions of the statute have not been complied with, and the contract is a nullity. And yet such is the effect of this rule, and the construction which has been given to the authorities referred to. An absurdity so glaring will never be sanctioned by this court but upon authorities too conclusive to be disregarded. Nor does this famous rule appear to be consistent with the reasoning of the learned tribunal in the case in which it was adopted, or free from doubt or unshaken hy judicial decisions of the country in which it was promulgated. In *Stokes vs. Moore*, Baron *Eyre*, after stating the rule says "but I do not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, can amount to such an authentication as is required by the statute." But if a case had arisen like the present, where the name is inserted in such a way as to control the whole agreement, and be applicable to every purpose of it, the inference would not be unreasonable, from the learned Baron's own reasoning, that he did understand how it could amount to such an authentication as the statute requires. Moreover, the case of *Stokes vs. Moore*, is now understood to have turned, not upon the circumstance of the name being contained in the body of the instrument, but its being applicable to particular purposes only, and not governing the whole instrument: as fully appears from the opinion of the Master of the Rolls in *Ogilvie vs. Foljambe*. In which he says "it is admitted, that provided the name be inserted in such manner as to have the effect of authenticating the instrument, the provision of the act is complied with, and it does not much signify in what part of the instrument the name is to be found. In *Stokes vs. Moore* the objection was that this authentication was wanting, the name being introduced incidentally in the middle of the paper, and referring, in gram-

matical construction only, to a single term in the conditions. There was no objection on the score of the christian name being wanting, *but the ground of the decision was, that the name, being introduced where it was, did not govern the entire agreement.*" From these remarks of the Master of the Rolls it manifestly follows, that he deemed an agreement, in the handwriting of a defendant, with his name so inserted in the body of it, as to govern the whole agreement, sufficiently signed within the meaning of the statute. That the name of *Samuel S. Thoms* is so inserted in the agreement in question cannot be denied, as it forms a part of every clause and provision which it contains. The case of *Saunderson vs. Jackson*, determined by Lord *Eldon*, whilst chief justice of the common pleas, is also strongly in favour of the plaintiff, and the decison of the supreme court of *New-York*, affirmed in the high court of errors, in *Clason vs. Bailey*, 14 *Johns. Rep.* 487, presenting the identical question before us, is of the most imperious authority. Chancellor *Kent*, in delivering his opinion, there states, that "it is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing, and the names of the contracting parties appear. "This doctrine of Chancellor *Kent*, is so simple in its nature, so easy of application, so consonant to reason and common sense, that supported, as it is, by the opinions of Lord *Hardwicke*, Lord *Eldon*, and Sir *Wm. Grant*, it would be a safer guide to follow, than the technical rule to which the case of *Stokes and Moore* has given birth. Whether the name of the defendant therefore be so introduced as to authenticate the whole instrument or not, is deemed immaterial, if it be so inserted as to govern or be applicable to the whole substance of the writing.

If it be conceded that *Samuel S. Thomas* is liable to an action on the agreement, the next and only remaining question to be considered is, can such action be sustained in the joint names of *Higdon & Wife*, the present plaintiffs? The agreement,

designates no person to whom the purchase money is to be paid. View it then as a case of implied promise. Where the law is left to raise the *assumpsit*, it is always implied in favour of those who are the meritorious cause of action, or from whom the consideration moves. The consideration here being the inheritance of the wife, in or over which, during his life only, has the husband any interest or control, in the absence of an express promise, the law will raise one to husband and wife, on which the husband may, at his pleasure, either sue in his own name, or in the names of himself and wife. But suppose it be considered that the agreement does amount to an express promise to pay to the husband; is it not perfectly consistent with legal principles, in analogous cases, that the husband having acted, by the consent of the wife, concerning a subject matter over which he had no power or control but in virtue of such consent, shall be deemed to have acted on the account, and for the benefit of himself and wife. Nor would his concealment of the principles on which he acted at all vary the case. It is every day's practice for the owners of merchandize, or other property, to sue in their own names on contracts of sale made by their agents, to whom express promises to pay have been made, and with whom the vendee's dealt, as sole owners of the property, having no knowledge of their principals. So, also where one part-owner sells, as his own, the property of his firm, all the partners may sue. But there could be no concealment from the defendant of the intentions with which *Thomas Higdon* acted through his agent, *John S. Frazier*, as the condition of the bond of conveyance is, that the deed to *Samuel S. Thomas* shall be executed by *Higdon* and *Wife*. That the defendant is in anywise damnified by the present form of action, has not been even insinuated.

It is not intended to impugn the numerous decisions which have been cited, that a *feme covert* cannot be joined in an action to recover the price of property sold by her, and which belonged to her before coverture; or the value of services by her personally rendered, unless there be made to her an express promise of payment. But these decisions apply only to cases of goods and chattels, which by the marriage vested absolutely in the husband; as does the right of her personal services, and

are wholly inapplicable to a case where the rights of the wife pass not to the husband, but remain and survive to her, and over which the husband has no power of transfer, but by the consent and co-operation of the wife.

Being of opinion that, upon the whole circumstances of the case, the plaintiffs are entitled to recover, and in the form of action too in which they have sought to prosecute their rights, we reverse the judgment of the county court.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## CAPPEAU'S Bail *vs.* MIDDLETON & BAKER.—June, 1827.

A writ of *scire facias* against *special bail*, which does not recite the issue and return of a *ca sa.* is sufficient upon issue joined on the plea of *nul tiel record.*

To such writ, the bail having pleaded the death of his principal before any *ca. sa.* returned, the plaintiff in his replication traversed that fact, and tendered an issue to the country. Its conclusion was technically right; an issue joined on such pleadings, is not an immaterial one, the whole matter in controversy being decided by it.

The omission of the plaintiff in his replication to set out the *ca. sa.* and return, in proceedings against bail, is mere informality in pleading, bad only on demurrer, and cured by verdict.

The power conferred on a commissioner to take testimony is strictly personal. Especial confidence is presumed to be reposed in the person appointed, and he cannot delegate his authority.

APPEAL from *Baltimore* County Court. On the 8th of May 1818 a writ of *scire facias* issued out of *Baltimore* county court, on a recognizance of special bail entered into in the usual form in that court at September term 1816, by *Joseph Cappeau*, (the appellant,) for *Charles Cappeau*, at the suit of *Middleton* and *Baker*, (the appellees,) in a plea of trespass on the case, &c. by the said *Middleton* and *Baker* against the said *Charles Cappeau*, in the same court prosecuted, &c. The writ of *scire facias* then stated, that in the said court in September 1817, *Middleton* and *Baker* recovered judgment against *Charles Cappeau* for the sum of, &c. Nevertheless the said *C. Cappeau* the damages, &c. to the said *Middleton* and *Baker* had not satisfied, nor his body in execution of such judgment to the public prison of the said county had rendered, &c. Wherefore the said *Middleton* and *Baker* had besought a proper reme-

dy, &c. Command was therefore given to the sheriff to give notice to *Joseph Cappeau*, in the usual form of such writs of *scire facias*. The defendant, (the special bail,) appeared, and pleaded, (after praying oyer of the writ of *scire facias,)* 1. *Nul tiel record* of recognizance. 2. That before the suing out of the writ of *scire facias*, and before the return of any writ of *capias ad satisfaciendum* issued on the said judgment against the said *Charles Cappeau*, to wit, on, &c. the said *Charles* died, to wit, at *Saint Domingo*, &c. To the *first* plea the plaintiffs replied *habetur tale recordum* of recognizance, and issue was joined to the court upon the record. To the *second* plea the plaintiffs replied, that *Charles Cappeau* did not die before the return of the writ of *capias ad satisfaciendum* issued against him upon the said judgment; and tendered an issue to the country, which was joined in by the defendant. Upon the *first* issue, the county court gave judgment for the plaintiffs, that there was such record, &c.

At the trial of the issue joined on the *second* plea, the defendant offered in evidence a commission issued out of *Baltimore* county court, in the usual form, to *Robert Lavens* and *Pelegrin Vidal* of *Mayaguez*, commissioners, for taking the testimony of witnesses in the said action, by them or either of them, &c. Also the translations, (made by consent of the parties,) of certain depositions in the *Spanish* language, returned with the said commission. It appeared by the return of *Robert Lavens*, the commissioner who acted, that he addressed a request to the governor, judge or the proper officer of the place, to cause the commission, which was in *English*, to be translated into the *Spanish* language by the public interpreter of the town of *Yagues*, where the commissioner resided. This was complied with. The commissioner then addressed another request to the same person, in which, stating himself to be commissioner, &c. he requested that he would be pleased to admit a declaration of witnesses, and to bind under oath those whom he the commissioner should present, to answer certain interrogatories which might be propounded according to the usual form. He then set forth the interrogatories. And that these being done, to let a testimony of these proceedings, corroborated by the signature of two or three notaries public, be drawn,

&c. This request was granted, with directions, that all the witnesses presented swear and declare according to the form and manner requested, &c. It was then stated that in the town of *Mayaguez*, on the 2d of August 1824, "the party requesting the declaration, presented as a witness, *Joseph Lenner*, a resident of this place. The *Alcade* took his oath before me, which he performed according to law, and under which promised to tell the truth in every thing which he would be interrogated; and being requested to answer the preceding interrogatories; to the *first*, he said," &c. "He signed it with the *Alcade*, before me. I attest, *Arroyo*. (Signed) *Aldiexi*. (Signed) *Lenner*. Before me, (signed) *Peter Arroyo*, Notary Public." "On the same day I notified, and delivered these proceedings to the party concerned, which I attested. Signed *Arroyo*." The testimony of another witness was taken in a similar manner. The commissioner who acted, then certified to *Baltimore* county court, that *P. Vidal* and himself, being charged and named as commissioners, having to take an oath prescribed in the commission, before a person authorised to administer the same, presented themselves to the proper authority for that purpose, and were informed that it was impossible to act *extra*-judicially in this case, so as to effect the commission according to the tenor of the oath. That before they could cite any witness in this case, it was necessary to make a representation to the judge for permission to have their power translated by a public interpreter, by which he could be instructed with the nature of the commission and according to law execute the same. That had they, or either of them, being charged simply to take information from persons acquainted in the affairs, it might have been fully and satisfactorily executed; but to have an oath, prescribed by the laws of a court in a foreign country, to be administered and subscribed to by a person in another, was a thing that the judge of that place did not, nor would not understand, though the commissioners explained to him the nature of the commission, and said he would not cite the witnesses, who lived at a distance, except it was notarially and publicly done, &c. The plaintiffs objected to the admission of the said evidence; and insisted that the said depositions ought not to be read in evidence. And the Court [*Archer*,

Ch. J. and *Ward*, A. J.] were of opinion that the said depositions ought not to be admitted in evidence. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last June term before BUCHANAN, Ch. J. and MARTIN, STEPHEN, and DORSEY, J.

*Scott*, for the Appellant, contended, 1. That it did not appear by the record, that a writ of *capias ad satisfaciendum* against *Charles Cappeau*, the principal, was returned *non est inventus* before the issuing of the writ of *scire facias* against *Joseph Cappeau*, his special bail. 2. That the court below erred in refusing to permit the evidence contained in the bill of exceptions, to go to the jury.

1. The replication to the *second* plea concludes to the country, instead of concluding with a verification. The replication does not state that a *ca. sa.* had been issued, and was returned *non est*. The issue joined was therefore an immaterial issue, and a repleader should have been awarded. He cited 1 *Bac. Ab.* tit. *Bail*, 342, 343. *Filewood vs. Popplewell*, 2 *Wils.* 65. *Chandler vs. Roberts, et al. bail of White*, 1 *Dougl.* 58. *Tidd's Pr.* 644, 645. *Henderson vs. Withy*, 2 *T. R.* 576.

2. The testimony returned with the commission should have been permitted to go in evidence. 1 *Phill. Evid.* 272, *(note* a,) 273. *Winthrop vs. Union Insurance Company*, 1 *Condy's Marsh.* 707, *(note.)*

*Finley*, for the Appellees. On the *first point*, cited *Williams vs. Vaugh*, *Cro. Jac.* 97. 1 *Chitty's Plead.* 545, (547.)

On the *second point*, he referred to the act of 1773, *ch.* 7, *s.* 7. 1 *Harr. Ch. Pr.* 324, 326. *Rex vs. Croke*, 1 *Cowp.* 26. *Boreing's Lessee vs. Singery*, 2 *Harr. & Johns.* 459. As to the proof of foreign laws, and the manner of executing commissions issued to foreign countries to take testimony, he cited *Mostyn vs. Fabrigas*, 1 *Cowp.* 174. *Church vs. Hubbart*, 2 *Cranch*, 187, 236, 238. *Baptiste vs. De Volunbrun*, 5 *Harr. & Johns.* 98. *De Sobry vs. De Laistre*, 2 *Harr. & Johns.* 229, 230. *Boreing's Lessee vs. Singery*, *Ib.* 459. *Pancoast vs. Addison*, 1 *Harr. & Johns.* 350. He contended, that the

commissioners could not delegate their powers, nor could their powers be transferred to others—it was a special confidence reposed in them. *Bailis vs. Cochran*, 2 *Johns. Rep.* 417.

*Curia adv. vult.*

DORSEY, J. at this term delivered the opinion of the court. The appellees having sued out a *scire facias* against the appellant, as special bail of *Charles Cappeau*, in the usual form, without setting out the issuing and return of *ca. sa.* the appellant pleaded *nul tiel record;* and also that his principal died before any *ca. sa.* returned. On the *first* plea an issue was joined, and judgment given thereon by the court against the appellant. The appellees in their replication simply trraversed the fact, alleged in the *second* plea, (without setting forth the *ca. sa.* which had issued and been returned, the time when, &c.) and tendered an issue to the country, in which the appellant joined. The verdict and judgment being rendered against the appellant, he seeks a reversal by this court. *First.* On the ground that the appellees' replication to the *second* plea concludes to the country, instead of concluding with a verification, which it should have done. If this objection were well founded, it cannot avail the appellant here; his remedy should have been by demurrer in the court below; the defect, if it existed, is cured by verdict. But there is no such defect as that complained of. The replication contains no new matter, which the appellees had a right to demand an opportunity of answering; but is a direct and naked denial of all the matters contained in the plea, and could technically conclude in no other way than by tendering an issue to the country.

The *second* ground of reversal is, that this replication is erroneous in not setting out the *ca. sa*, with the time of its issuing and return, and that the issue joined upon it is an immaterial issue; and that instead of a final judgment upon the verdict, a repleader should have been awarded. That surely cannot be an immaterial issue which decides the whole matters in controversy between the parties. Such was the issue to which exceptions are now taken. The issue being material, no judgment of repleader could have been given. Admitting, that upon the authority of the case of *Fortune vs. Manucaptors of*

*Davis, Carth.* 8, recognised by Justice *Buller* in *Chandler vs. Roberts and another bail of White*, 1 *Dougl.* 58, the replication ought to have set out the *ca. sa.* and return, (although a different precedent appears in 2 *Harr. Ent.* 472); yet the omission to do so, in the present case, is mere informality in pleading, which is only bad on demurrer. But if it be matter of substance, it is remedied by the verdict, which the jury could not possibly have given, unless the issuing and return of the *ca. sa.* had been in evidence before them. And by this form of the issue, the rights of the appellant, though somewhat modified, in truth sustain no diminution. If the *ca. sa*, and its return, had been formally stated in the replication, the appellant might, by a plea of *nul tiel record*, have put their verity to issue before the court. He accomplishes, in effect, the same object, when on the trial he objects to their going in evidence to the jury. The question presented for the decision of the court, becomes in both cases precisely the same.

The objections to the pleadings being disposed of, it only remains to be inquired, whether the court erred in rejecting the testimony returned with the commission? We think they did not. The power conferred on a commissioner to take testimony, is strictly personal, and on its faithful execution the most important interests of the parties may depend. To ensure such fidelity, oaths, to be taken by the commissioner, and the person by him to be employed as clerk, are annexed to the commission. Especial confidence also is presumed to be reposed in the person appointed. Upon no principle of reason or law, therefore, can the testimony returned with the commission be admissible. The person by whom it was taken held no share in the confidence of the parties or of the court; he received from them no delegation of authority; and even if he had, having failed to take the requisite oath, his proceedings are a nullity. For this singular attempt to transfer a strictly personal trust, the record in this case furnishes neither solution nor apology.

JUDGMENT AFFIRMED, *(a.)*

*(a)* If the government of the place where a commission has issued to take testimony, will not permit it to be executed, the court here will issue *Letters Rogatory* for the purpose of obtaining testimony. See 1 *Peter's C. C, Reports*, 236, and the form of such letters.

## CHASE *vs.* GLENN,—June, 1827.

An appeal does not lie from the refusal of the county court, on the motion of an insolvent debtor, to grant a rule on the trustee of such insolvent, who had given the usual bond, requiring him to show cause why his appointment should not be revoked.

APPEAL from *Anne-Arundel* County Court. By the record it appeared, that at April term 1822, *Samuel Chase*, (the appellant,) exhibited his petition to *Anne-Arundel* county court, praying for the benefit of the insolvent laws, stating that he was in actual confinement, &c. A schedule of his property, and a list of his creditors, on oath, accompanied his petition. The petitioner being brought before the court by the sheriff, took the oath required by law, and obtained a personal discharge, and was ordered to appear before the court at the next October term. He appeared at October term 1822; and he was further ordered to appear before the court at the next April term. At April term 1823 he again appeared, and the court directed that he cause notice be inserted in one of the public newspapers printed in *Annapolis*, once a week for three months, before the next October term, notifying his creditors to appear then before the court for the purpose of recommending a trustee for their benefit, and to show cause, if any, why the said *Chase* should not have the benefit of the insolvent laws. At an adjournment of April term, held in June 1823, certain of the creditors of *Chase* filed in court their recommendation in writing, of *Elias Glenn*, (the appellee,) to be appointed trustee for the benefit of the creditors of *Chase*. Which appointment the court accordingly made; and ordered *Glenn*, the trustee, to enter into bond to the state for the use of the creditors of *Chase*, in $50,000, conditioned, in the usual form. Which bond *Glenn* entered into, with one security, on the 23d of June 1823. At October term 1823, *Chase* moved the court for a rule on *Glenn* to show cause, by the next April term, if any he had, why his appointment should not be set aside and revoked by the court. At April term 1824 the court overruled this motion. From which decision of the court *Chase* appealed to this court.

The cause came on for argument before BUCHANAN, Ch. J. and MARTIN, STEPHEN, and ARCHER, J. when

*Meredith*, for the Appellee, moved the court to dismiss the appeal, as not being a case where an appeal would lie to this court.

THE COURT. We must dismiss the appeal. This court has no jurisdiction of the case.

APPEAL DISMISSED.

J. & P. TURNER *vs.* JENKINS, *et al.*—June, 1827.

If one party gives in evidence a part of a conversation between the other party and a witness, it is competent for such other party to extract from the witness the whole of that conversation.

A declaration which contains a count for matters and articles properly chargeable in account, as appears by a particular account filed, no account being filed; and another count for special services, which did not state an assumption of any particular sum, will not authorise a recovery.

Where the pleadings were in that state, and the evidence contained in the bill of exceptions showed the plaintiff had some claim, and the verdict and judgment being for him, the appellate court, on reversing the judgment, awarded a *procedendo*.

APPEAL from *Saint-Mary's* County Court. This was an action of *assumpsit*, brought by the appellees, (the plaintiffs below,) against the appellants, (the defendants below.) The declaration contained two counts. 1st. An *indebitatus assumpsit* count, under the act of assembly of this state, for sundry matters and articles properly chargeable in account, to the value of $200, "as per account filed," &c. 2d. A special count, which charged for the carriage and transportation of "divers hogsheads of tobacco," belonging to the defendants, in the vessels of the plaintiff, from *Port Tobacco* in *Charles* county, to the city of *Baltimore*," at the request of the defendants; and that the defendants being thereof indebted, in consideration thereof promised to pay "the last aforesaid sum of money" on request. Nevertheless, &c. The defendants pleaded *non assumpsit*, on which issue was joined. No account was filed in the cause.

1. At the trial it was admitted that the defendants were partners in trade. The plaintiffs then produced and swore *Robert Tench*, a competent witness, who stated that in the year 1819,

about the month of May or June, when the tobacco mentioned in the declaration was carried from *Port-Tobacco* to *Baltimore*, the plaintiffs were joint owners of the schooner *Consort*, the vessel that carried the tobacco. To which testimony the defendants by their counsel objected. But the Court, [*Key*, and *Plater*, A. J.] were of opinion that the same was legal testimony, and suffered it to go to the jury. The defendants excepted.

2. The plaintiff further proved by the said witness, that he heard *Josiah Turner*, one of the defendants, say that the plaintiffs carried from *Port-Tobacco*, to *Baltimore*, the tobacco he purchased from *Samuel Chapman*, in said vessel, in the year aforesaid; and that *Chapman* sold to the defendants forty-two hogsheads of tobacco. The plaintiffs then produced and had sworn *Hugh Cox*, a competent witness, who stated, that in the year 1819, the freight for a hogshead of tobacco from *Port-Tobacco*, to *Baltimore*, was two dollars. The said witness further proved, that there were four additional hogsheads of tobacco shipped in the said vessel to be carried to *Baltimore*, from *Port-Tobacco*, for and on account of the defendants, at the same time. The defendants then offered to prove by *Tench*, that he heard *Lewis A. Jenkins*, one of the plaintiffs, say that the tobacco was damaged on board of said vessel in the transportation from *Port-Tobacco*, to *Baltimore*. And further offered to prove, by said witness, that at the time one of the defendants, to wit, *Josiah Turner*, told him that the tobacco he purchased of *Samuel Chapman*, was shipped to *Baltimore*, by the plaintiffs, in said vessel, the said *Josiah Turner*, then said that the said tobacco was damaged; but does not recollect that he said it was damaged to any particular amount, or that it was damaged to the amount of the freight. To the admissibility of which testimony the plaintiffs objected; and the court were of opinion that the same was not admissible, and refused to permit it to go to the jury. The defendants excepted.

3. The defendants then prayed the court to instruct the jury, that under the pleadings in the cause, the plaintiffs were not entitled to recover. But the court refused to give the instruction. The defendants excepted; and the whole of the proceeding was

included in one bill of exceptions. The verdict and judgment being against the defendants, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J. by

*Magruder*, for the Appellants, and by
*C. Dorsey*, for the Appellees.

EARLE, J. delivered the opinion of the court. The action in this case was brought to recover freight on forty-six hogsheads of tobacco, transported by *Jenkins* and others, the plaintiffs below, for the defendants, from *Port Tobacco*, in *Charles* county, to the city of *Baltimore*. The declaration contains two counts. One count for certain articles properly chargeable in account, as appears by a particular account exhibited; whereas no account whatever appears in the record. The other count is an *indebitatus assumpsit* for freight on tobacco transported from *Port Tobacco*, in *Charles* county, to the city of *Baltimore;* but it alleges no sum in which the defendants were indebted to the plaintiffs for this service rendered, neither does it state the assumption by them to pay any sum in particular for the same. To this declaration the defendants pleaded *non assumpsit;* and on the trial they tendered a bill of exceptions, which was signed by the court. In this bill of exceptions the court below express several opinions, in one of which we concur with them, and in the others we think they were clearly wrong.

The statement of the witness, *Tench*, that the plaintiffs were the joint owners of the schooner *Consort*, when she carried the tobacco to *Baltimore*, was admissible proof, although not very satisfactory testimony, without some explanation of his knowledge of the plaintiffs' ownership, if it was a point desirable to be established on the trial of such an issue. The same witness ought to have been suffered to relate what he had heard one of the plaintiffs, *Jenkins*, say concerning the damage of the tobacco in its passage to *Baltimore*, as well as the whole conversation he held with *Josiah Turner*, one of the defendants, on the same subject, whose admission, relative to the quantity of the tobacco, had been made use of by the plaintiffs,

We are also of opinion, that the court erred in refusing to give the last instruction prayed for by the defendants.

The pleadings in the cause, on behalf of the plaintiffs, are not in a state to authorise a recovery, however just their demand may be. We reverse the judgment of *Saint Mary's* county court, and return them the cause on a *procedendo*.

JUDGMENT REVERSED, &c.

GILES, Adm'r. of BACON, *vs.* PERRYMAN.—June, 1827.

Where a declaration sets forth a claim or demand of the plaintiff against the intestate of the defendant, and the intestate's promise to pay it, a reference of such demand, by his administrator, (the defendant,) and the plaintiff, to arbitrators—an award, in pursuance of such reference, for a specific sum in favour of the latter—a promise by the defendant, as administrator, to pay it, and charges a breach in the nonpayment of that sum, it contains matter enough to warrant a judgment against the defendant in his character of administrator. The plaintiff is under no necessity to aver assets in the hands of the defendant, as administrator, sufficient to pay his debt.

This peculiar mode of declaring originated in a plan to save the Statute of Limitations, and proceeds upon the ground, that it neither pledges the personal responsibility of the administrator after verdict, nor deprives him of any defence he could have had, if he had been charged with an *assumpsit* by his intestate; and with these qualifications, it will be received and adopted.

An administrator who relies on the general issue plea, after verdict and judgment thereon, has admitted assets to pay the amount claimed of him.

By the statutes of 21 *Jac.* I, *ch.* 13; 5 *Geo.* I, *ch.* 13, and the act of assembly of 1809, *ch.* 153, a variance between the writ and declaration is cured after verdict.

No form of words is necessary to be used in an averment that a defendant is administrator; if enough is said to amount to an allegation, that the defendant administered on the estate of the deceased, it will suffice.

A declaration vicious on account of an averment obscurely made, is not such a fatal objection as will reverse a judgment.

APPEAL from *Baltimore* County Court. Action of *assumpsit*. The writ was against the defendant (now appellant,) in his own right. The declaration contained two counts. The *first* count stated, that "a certain *James Bacon*, late of *Baltimore* county, deceased, on whose estate the defendant hath administered, some time before his death, cut down, destroyed, and took away, a large quantity of timber from off the land of the plaintiff, for which the said *James* never paid or satisfied

the plaintiff, although often requested so to do, to wit, at the county aforesaid; but always promised and engaged to and with the plaintiff, that he would pay and satisfy him for the same timber. And whereas, after the death of the said *James*, and the administration on his estate, so as aforesaid taken out by the defendant, he the plaintiff and defendant agreed to leave the valuation of said timber to a certain *Abraham Jarrett* and *Walter T. Hall*, of *Harford* county aforesaid, he the defendant, agreeing to pay to the plaintiff whatever sum the said two persons might determine and award the said timber to be worth. And the said *Jarrett* and *Hall*, in pursuance of said agreement between the plaintiff and defendant, afterwards, to wit, on the 30th day of July in the year 1818, at *Harford* county aforesaid; that is to say, at *Baltimore* county aforesaid, did award and determine that said timber, so as aforesaid cut down and destroyed, and taken away by said *James*, was worth the sum of $197, and made out a written award to that effect; of which the plaintiff and defendant afterwards, to wit, on the day and year last aforesaid, at *Baltimore* county aforesaid, had notice. Whereupon the defendant became liable to pay the said sum of $197 to the plaintiff; and being so liable, he the defendant, *as administrator aforesaid*, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at *Baltimore* county aforesaid, undertook and faithfully to the plaintiff did promise, that he the defendant, *as administrator* of said *James* as aforesaid, would well and truly content and pay the plaintff the said sum of $197, when afterwards he should be thereunto requested." The *second* count was upon an *insimul computassent* between the plaintiff, and defendant as administrator aforesaid, of divers sums of money due and owing by the defendant, as such administrator, to the plaintiff, &c. The defendant demurred to the declaration. The county court overruled the demurrer as to the *first* count in the declaration, and sustained it as to the *second* count. The defendant, with the leave of the court, then pleaded *non assumpsit* to the *first* count, and issue was joined. Verdict for the plaintiff, and judgment against the defendant, as administrator of *Bacon*, *si non*, *de bonis propriis* as to costs. The defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

*Scott* and *Meredith*, for the Appellant. 1. The declaration does not pursue the writ, and the judgment is against the defendant as administrator. 2. The declaration does not aver that the defendant administered upon the personal estate of *Bacon*, or that assets came to his hands. 3. A promise by an executor or administrator to pay the debts of the deceased, is *nudum pactum*, unless assets came to his hands.

The promise from the defendant to the plaintiff is without consideration; and the verdict is, that the defendant did assume, &c. There was no sufficient promise to justify the allegation in the declaration, nor any finding of the jury sufficient for the judgment. *Newl. on Cont.* 79. There was no averment that assets came to the hands of the defendant as administrator, sufficient to enable him to make the promise. *Mitchinson vs. Hewson*, 7 *T. R.* 346, *(note.)* It cannot be supplied by intendment that there were assets in the defendant's hands. The submission to arbitration is not an admission of assets. *Pearson vs. Henry's, Adm'r.* 5 *T. R.* 6.

*R. Johnson*, for the Appellee. The propriety of the judgment below is questioned, principally on two grounds. *First.* Because the promise declared upon in the *first* count of the declaration is without consideration, and therefore void; and *Secondly.* Because if it be a valid promise at all, it was only so far valid as to bind the appellant in his capacity of administrator, and that a sufficiency of assets in his hands to meet the debt should have been averred. Upon the first of these grounds the case of *Rann vs. Hughes*, cited in 7 *T. R.* 346, *(note a,)* and in 1 *Com. Cont.* 49, was solely relied upon. Adverting to that case, it will be found to have been an action brought against *Hughes*, the defendant, as administrator, and, that the only question decided, or raised at the argument, was whether upon the declaration there was sufficient matter to authorise the judgment which had been rendered in the court below, against the defendant *de bonis propriis?* There was ample matter in that declaration to have justified a judgment against the defendant *de bonis intestatoris.* The case turned indeed

wholly on the true construction of the *fourth* clause of the Statute of Frauds, 29 *Car.* II. *ch.* 3, in relation to agreements binding executors or administrators *personally* for the debts of their deceased testators or intestates. That case has no bearing upon the one now before this court. The question here is not, at any rate, whether the *first* count in the declaration contains matter sufficient to justify a judgment against the appellant in his *individual capacity*, but whether there is matter enough in it to warrant a judgment against him in *his character of administrator*, and of this can there be a doubt? A debt appears by the declaration to have been due by the appellant's intestate. He is charged with having converted to his own use the chattels of the appellee, and to have promised payment for them afterwards, and to have died without making the payment. The appellant, after having administered, and the value of the property thus taken by his intestate, being unascertained, leaves the valuation of it to arbitrators, and agrees, as administrator, to pay what they may award; they make the award stated in the count in question, and the appellant is charged to have promised, *as administrator*, to pay it. If these facts do not bind the administrator, *as in his character of administrator*, and authorise a judgment against him in *that character*, it would be difficult to imagine a case in which such a result could be effected. *Sollers vs. Lawrence, Willes*, 421.

Upon the *second* ground, that assets should have been averred, no authoriiy was cited. The question is raised after a verdict in a case in which *only* the plea of *non assumpsit* was put in. A want of assets was not set up as a defence below. The court will find this point settled in favour of the appellee in 5 *Com. Dig.* tit. *Pleader*, (2 D. 1,) 576, cites 9 *Coke*, 24, (a;) and in *Elting vs. Vanderlyn*, 4 *Johns. Rep.* 237.

It is said also, that there is a variance between the writ and declaration; the one being against the appellant individually, the other as administrator of *Bacon*. The answer to this is two-fold. *First*. That in point of law there is no variance which in any stage could be taken advantage of; and *Secondly*. That if there be such a variance, it cannot be taken advantage of on a general demurrer, or at any rate, after a verdict in fa-

vour of the plaintiff. 1. It is a well settled principle, that a plaintiff, in his declaration, may narrow the demand he makes of the defendant by his writ. 1 *Chitt. Pl.* 253. 2. It is too late to take advantage of it. *Duvall vs. Craig*, 2 *Wheat.* 45. *Vanderplank vs. Banks*, 2 *Wils.* 85. *Hole vs. Finch*, *Ib.* 395, and our act of 1809, *ch.* 153.

The last point is, that the declaration does not aver that the appellant administered upon *Bacon's* estate. The declaration *expressly* states that *he did administer upon Bacon's estate*, and it calls him *throughout*, such administrator. This way of declaring will be found amply sufficient under any defence which may be pleaded, and certainly where general defence only is taken. *Holliday vs. Fletcher*, 2 *Ld. Raym.* 1510. S. C. *Stra.* 781. *Garland vs. Chattel*, 12 *Johns. Rep.* 430. *Barnes*, 159, 160. 5 *Com. Dig.* tit. *Pleader*, (2 D. 11,) 586, and *Dean, &c. of Bristol vs. Guyse*, 1 *Saund.* 112, *(note 2.)*

EARLE, J. delivered the opinion of the court This is an appeal in an action of *assumpsit*, brought by *Perryman*, the appellee, to recover a debt due to him from one *James Bacon*, on whose estate *Giles*, the appellant, administered. The writ issued against *Giles* in his own right, the declaration counts on a promise made by him as administrator of *Bacon*, and the judgment is against him *de bonis testatoris*. The *second* count in the declaration was, on demurrer, disposed of by the court against the plaintiff, and makes no part of this case. To the *first* count the general issue was pleaded, and a verdict rendered against *Giles*, as administrator, for the debt of the intestate. He has taken this appeal; and upon his objections to the record, the opinion of the court will now be pronounced. The principal objections are to the declaration; and is contended that it does not contain matter enough to warrant a judgment against the defendant in his character of administrator; and that it is defective in not averring assets in his hands to pay the debt, wherewith the judgment charges him as administrator.

The declaration sets forth a debt due from *Bacon*, in his lifetime, and his promise to pay it; it sets forth also a reference of this demand between the plaintiff, and the defendant as administrator, to persons named by them, who rendered an award for

$197, due the plaintiff, which sum the defendant, as administrator of *Bacon*, undertook and promised to pay, and it charges a breach in the nonpayment by the defendant of this sum. This peculiar manner of declaring originated in a plan to save the statute of limitations, is according to the approved precedents of *Wentworth* and *Chitty*, and has the authority of several respectable judicial decisions. *Secar vs. Atkinson*, 1 *H. Blk. Rep.* 102, is among the earliest of them. In that case the declaration contained four counts. Three upon promises made by the intestate, and the fourth stated, that the plaintiff accounted with the defendant, as administratrix, of and concerning divers sums of money, &c. owing from the intestate to the plaintiff, and upon that account the intestate was found in arrear, and indebted to the plaintiff, &c. and being so found in arrear and indebted, she, as administratrix, in consideration thereof promised, &c. Exception was taken to this declaration on the score of misjoinder in action; and it was urged, that the first counts, being on the undertaking of the intestate, and the last count on that of the administratrix herself, the judgment on the former must be *de bonis testatoris*, and on the latter *de bonis propriis*. But the court thought otherwise, and distinctly determined that the defendant was charged in all the counts as administratrix, and that the judgment on all the counts should be *de bonis testatoris;* and in deciding *Secar vs. Atkinson*, the case of *Hawes vs. Smith*, 1 *Vent.* 268, and 2 *Lev.* 122, was examined by the court, and declared irreconcileable with any true principle of the law. *Whitaker vs. Whitaker*, 6 *Johns. Rep.* 112, is a more recent authority, giving sanction to this mode of declaring. Judge *Spencer*, who delivered the court's opinion, not only approves of it, but he states that the same defence may be made to it, as to a count charging the promise made by the testator. In this case, as in the case before us, there is but a single count in the declaration, and it simply states that the testator was indebted to the plaintiff for money lent and advanced; and being so thereof indebted, the defendant, as his executor, after his death, in consideration thereof, upon himself assumed to pay, &c. No promise by the testator is stated; and yet it had the approbation of that enlightened court, who declared it a valid declaration, and that the proper judgment thereon was *de bonis*

*testatoris.* These adjudications, it is perceived, go upon the grounds that this mode of declaring neither pledges the personal responsibility of the administrator after verdict, nor deprives him of any defence he could have had, if he had been charged with an *assumpsit* by his intestate; and it is with these qualifications it will be received and adopted by this court. And the debt due from the deceased, being the consideration of the promise by the executor or administrator, it would be advisable at all times to state it clearly and plainly, and to be prepared to support it by competent proof; as it would be strictly to observe to insert the words, "as executor," or "as administrator," after the promise made by the defendant in his representative character.

The decisions referred to upon this first objection, disposes of the second made by the defendant to the plaintiff's declaration.

The plaintiff was under no necessity to aver assets in the hands of the defendant, sufficient to pay his debt as administrator. It was open to the defendant to plead *plene administravit*, or any other plea, going to show a defect of assets, as much as it would have been in an ordinary suit against him upon the promises of his intestate; and if this defence was within his power, and has been pretermitted by him, he is only placed in the situation of many others, who have defended themselves on wrong and mistaken grounds. The general issue plea, he has chosen to use, and by the verdict and judgment thereon, he has admitted assets to pay the debt claimed of him.

On the argument of this cause, other objections were made to the record by the defendant's counsel, upon which we will also offer some short observations. It was said that the variance between the writ and declaration is fatal, and ought to reverse the judgment; and that the omission in the latter to aver, that the defendant administered on *Bacon's* estate, is also a palpable error.

The writ is against the defendant in his own right, and the declaration charges him in his representative character, and there is certainly a seeming variance, if he is in time to take advantage of it. This, then, is the question presented to us,

and it will be answered by a recurrence to the authorities. We have been referred to *Duvall vs. Craig*, 2 *Wheat.* 45, where the Supreme Court of the *United States* say, that a variance between the writ and declaration cannot be taken advantage of on general demurrer, but must be pleaded in the early stages of the case, in abatement. But Serjeant *Williams*, in his excellent notes on *Saunders*, (1 *vol.* 318, *note* 3,) holds a different doctrine. He has brought together all the adjudications on the subject, and has reasoned himself into the belief, that no advantage whatever can, at this day, be had, either of a defective original, or of a variance between it and the declaration. Be this as it may, and it is a point we do not now mean to decide, we are clearly of opinion, that the appellant has lost the opportunity, if he had one, of availing himself of this defect in the proceedings. There is a verdict rendered in this case for the appellee; and by the statutes of amendment and Jeofails, and an act of assembly passed in 1809, *ch.* 153, the defect mentioned is cured. The statutes of 21 *Jac.* I, *ch.* 13, and 5 of *Geo.* I, *ch.* 13, particularly point to a variance between the writ and declaration, and by their provisions, after verdict, the judgment shall not be reversed in any court of record for such variance. The act of 1809, *ch.* 153, is also explicit on this subject.

The further point in this case is readily answered. It is sufficiently averred in the declaration, that the defendant administered on *Bacon's* estate. No form of words is necessary to be used in an averment of this kind. If enough is said to amount to an allegation, that the defendant administered on the estate of the deceased, it will suffice. It is here expressly said that he did so administer; and if the defendant had been so disposed, he might have pleaded *ne unques* administrator, and concluded to the country, which only can be done where the subject matter of the plea is a denial of an affirmative allegation in the declaration. If, however, the declaration could be thought vicious on account of making this averment obscurely, surely it is not such a fatal objection to it as will reverse the judgment. No case, authorising such a conclusion, has been hinted at, and certainly the court have no knowledge of such an authority.

JUDGMENT AFFIRMED.

## FENWICK *vs.* FLOYD'S Lessee.—June, 1827.

There must be such a description of the land claimed in an action of ejectment, as will enable the sheriff to deliver possession after judgment.

A declaration claiming 251 acres, part of a tract of land called, &c. without any description of the part claimed, and a writ of possession in conformity, are both defective.

The return of a sheriff to a writ of *fi. fa.* showing a levy on part of a tract of land, without any description of such part, is defective, and a sale under it passes no title.

In an ejectment by a purchaser under a sheriff's sale, *against the debtor*, who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment, and the *fieri facias*, and to prove the sale of the land, which may be done, either by a deed from the sheriff, or a return of the *fi. fa.* They are sufficient to entitle him to recover.

In the absence of a deed from the sheriff, and his return to the execution, a memorandum in writing of the sale must be produced, to take the case out of the Statute of Frauds

APPEAL from *Saint-Mary's* County Court. Ejectment "for all that tract or parcel of plantable land, being *part of a tract of land* called *Resurrection Manor*, lying and being in the county aforesaid, containing 251 acres." The defendant, (now appellant,) pleaded not guilty, and issue was joined.

At the trial the plaintiff read in evidence a certificate of survey of *Resurrection Manor*, made on the 24th of March 1650, for *Thomas Cornwallis*, containing 4000 acres; also the record of a judgment rendered in *Saint-Mary's* county court in March 1821, in an action brought by *Floyd*, the lessor of the plaintiff below, against the appellant; and also of a *fieri facias* issued on that judgment, and the sheriff's return thereon, viz. "Laid as per schedule, and sold to *William Floyd* for $616 30, the 16th of January 1821." The schedule referred to stated, that the land seized under the *fieri facias*, was "*Part of Resurrection Manor*, containing 251 acres, more or less," and appraised to $1000. The defendant then prayed the court to instruct the jury, that the plaintiff was not entitled to a verdict. But the Court, [*Key*, A. J.] was of opinion that the plaintiff was entitled to recover, and instructed the jury to find a verdict for the plaintiff. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last June term, before BUCHANAN, Ch. J. and EARLE, MARTIN, ARCHER, and DORSEY, J.

*C. Dorsey*, for the Appellant, contended, 1. That the certificate of survey, offered in evidence, was not sufficient evidence that the proprietary had parted with his title, without producing a grant of the land. 2. That the return of the sheriff to the writ of *fieri facias*, was void for uncertainty in the description of the land sold. On the *first point*, he cited *Plummer vs. Lane*, 4 *Harr. & M'Hen.* 72. *Hall vs. Gittings*, 1 *Harr. & Johns.* 120. On the *second point*, he cited *Shep. Touch.* 249. 3 *Bac. Ab.* 389, 392. 4 *Com. Dig.* 131. 1 *Phill. Evid.* 203. *Williamson vs. Perkins*, 1 *Harr. & Johns.* 449. *Fitzhugh vs. Hellen*, 3 *Harr. & Johns.* 206. *Barney vs. Patterson*, 6 *Harr. & Johns.* 204.

*Causin*, for the Appellee. 1. Where the plaintiff and defendant claim under the same title, it was unnecessary to offer a grant of the land in evidence. He cited 2 *Phill. Evid.* 203. *Ramsbottom vs. Buckhurst*, 2 *Maule & Selw.* 565. 2 *Starkie's Evid.* 521.

2. As to the return of the sheriff to the *fieri facias*, and his sale, &c. he cited *Boreing vs. Lemmon*, 5 *Harr & Johns.* 225. *Barney vs. Patterson*, 6 *Harr. & Johns.* 204.

*Curia adv. vult.*

Martin, J. at the present term, delivered the opinion of the Court. It is not necessary to go into a particular examination of the several alleged errors in this case, for the proceedings are erroneous almost from the commencement to the termination of them.

An action of ejectment is a remedy given to the party to obtain the possession of lands which are wrongfully detained from him, and as the sheriff, after judgment, is to deliver the possession of the lands recovered, there must be such a description of them, as will enable him to effect that purpose.

This ejectment was instituted to recover 251 acres, part of a large tract of land called *Resurrection Manor*. By the certificate of survey it appears, that tract contains 4000 acres, and by the judgment in this case, *it would seem*, the plaintiff is entitled to 251 acres, part of that tract; but whether *that part* is to be located on the north, south, east or west side of the whole tract, is left in perfect uncertainty.

The declaration claims 251 acres, part of a large tract of land, without any description of the part claimed; the return to the *fieri facias*, relied on as evidence of title, is equally defective; it is for 251 acres, *Part of Resurrection Manor*, valued at $1000, without any metes or bounds, or other description, by which its location could be established. It has been contended, that this ejectment was brought to recover, not a *part* of the tract called *Resurrection Manor*, but for a *whole* tract that was called *Part of Resurrection Manor*; this is evidently a mistake. If we are to judge of the plaintiff's intention by his declaration, it is clear he claimed not a *whole* tract, but only a *part*. He describes it, not as a tract *called* "part of a tract," but as a tract of plantable land, *being* part of a tract called *Resurrection Manor*. This is apparent from the testimony offered at the trial—the certificate of survey, not of a tract *called part* of a *tract*, containing 251 acres, but of *Resurrection Manor*, containing 4000 acres; and it must be conceded, the certificate of one tract of land cannot be competent evidence to support an action for a different tract. The return to the *fieri facias*, under which he claims title, is also conclusive upon this subject. The sheriff sold, not a *whole* tract, but as he expressly states, *Part* of *Resurrection Manor*, and this return, (if the lands had been properly described in it,) could be only offered as evidence of title to such lands as were sold by him. If a writ of possession had been issued on this judgment, what part of the original tract could the sheriff deliver to the plaintiff under it? He must deliver 251 acres, but neither the writ of possession, the judgment, the return to the *fieri facias*, nor any other part of the proceedings, would enable him to make a location of them. It would be a vain and nugatory command that could not be executed.

The court do not mean to intimate that it was necessary in this case for the plaintiff to deduce a regular title from the patentee. In an ejectment, by a purchaser under a sheriff's sale, against the debtor, who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment, the *fieri facias*, and to prove the sale of the land, which may be done either by a deed from the sheriff, or a return to the *fieri facias*; and if these proceedings are correct, they are suffi-

cient to entitle him to recover. In the absence of a deed from the sheriff, and his return to the execution, a memorandum, in writing, of the sale, must be produced to take the case out of the Statute of Frauds.

JUDGMENT REVERSED.

BETTS, *et ux. vs.* THE UNION BANK OF MARYLAND.—June, 1827.

Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration only.

The greatest extent to which the authorities have gone, has been to allow an *additional* consideration to be proved, which is *not repugnant* to the one mentioned in the deed: but where a deed is impeached for fraud, *the party to whom the fraud is imputed*, will not be permitted to prove any other consideration in support of the instrument.

Ante-nuptial settlements, made in consideration of marriage, are good, even though the party be then indebted.

As a general principle of the law, delivery is essential to the legal existence and validity of a deed; but our legislative enactment declares a deed, recorded within the time prescribed by law, to be efficient and operative from the time of its date.

APPEAL from the Court of Chancery. The complainants in that court, (now appellees,) filed their bill on the 25th of September 1820, against the appellants, and *Edward Priestly*, in which it is stated that on the 24th of March 1819, *Betts*, (one of the defendants and appellants,) being indebted to the complainants in the sum of $1700, upon two promissory notes, one for $700, dated the 22d of February, and the other for $1000, dated the 25th of February then last passed, payable 60 days after their respective dates, both of which notes were drawn by *Priestly*, one other of the defendants, in favour of *Betts*, and by him endorsed, and discounted by the complainant for the sole use and accommodation of *Betts*, at their banking-house, in consideration that the complainants had agreed to extend the accommodation of the said notes for the term of three years from the 24th of March 1819; and to accept of a security on the property of *Betts* in lieu of *Priestly's* name and responsibility; and for the purpose of more effectually securing the payment of the said sum of money, and interest thereon, *Betts* made and executed a deed of mortgage or trust, dated

the 24th of March 1819, and thereby conveyed to the complainants, and their assigns, all that lot of ground in the city of *Baltimore*, No. 111, being part of a tract of land called *Todd's Range*, &c. with a proviso that the said conveyance should be void in case *Betts*, his heirs, &c. should, before the expiration of the term of three years from the date thereof, pay to the complainants the said sum of money, &c. But if default should be made by *Betts*, then the conveyance was declared to have been made in trust; and the complainants might after notice, sell the said lot of ground, &c. to satisfy and pay the said debt of $1700, or so much as should remain due, and should in the meantime renew the said notes at the end of every 60 days, and pay the regular interest or discount upon the same, &c. The bill further states, that a short time previous to the execution of the said mortgage to the complainants, *Betts* called on *Beale Spurrier*, a conveyancer, and requested him to draw a deed of a lot of ground which belonged to him, *Betts*, and on which his dwelling-house stood, (being the same lot of ground herein before referred to,) and to leave blanks for the name of the grantee, and the amount of consideration. That on the 17th of March 1819, *Betts* called again on *Spurrier*, and requested the blanks to be filled up, and the name of *Elizabeth Ball* inserted as grantee, which having been done, he executed the conveyance, and requested *Spurrier* to let the transaction remain private, stating that he was about to be married to the said *Ball;* that she was young, and he had thought proper to make this provision for her without her knowledge. That some days afterwards *Spurrier* was requested by *Priestly* and *Betts*, (but at different times,) to prepare some securities on the property of *Betts*, to the complainants, for a debt due to them; but upon discovering that a part of the property offered to be mortgaged was the same that had been a few days before conveyed to *E. Ball*, *Spurrier* observed to *Betts* that before he could consent to be privy to the execution of the mortgage, he must be satisfied that the previous conveyance to *E. Ball* had been cancelled, or else he must communicate its existence to the parties interested. *Betts* replied that it should be cancelled, that he had it in his possession, and that *E. Ball* had no knowledge of it. He then brought the deed to *Spur-*

*rier* and left it with him. That *Spurrier*, in pursuance of directions given to him by *Priestly* and *Betts*, prepared two several deeds of mortgage or trust—one on a parcel of ground belonging to *Betts*, on the south side of *Queen-street*, for the sum of $4000; and a second on the lot herein before mentioned, on the N. side of said street, being the same conveyed to *E. Ball* for $1700. *Betts* then requested *Spurrier* to prepare a deed from him to *E. Ball* for his reversionary interest or equity of redemption in the lot to be mortgaged for $1700. Which deeds having been prepared, were executed by *Betts* on the 24th of March 1819. It was then mentioned by *Spurrier*, that the first deed to Miss *Ball* should be destroyed. *Betts* repeated that she had no knowledge of it; that he wished to retain possession of it, in order that he might have it recorded in preference to the second one, in the event of his being able in the course of six months (upon which he confidently calculated,) to discharge the bank's lien, as in that case he wished his intended wife to have the benefit of the first conveyance; and pledged his honour that it should not be used unless his expectations to pay should be realized; and that he would request the bank to withhold the mortgage from record until six months should be nearly expired. In consequence of which said declarations and pledges made by *Betts*, *Spurrier* permitted him to take and retain the first deed to Miss *Ball*, and so far confided in his veracity and honour as to keep the complainants in ignorance of its existence, and of the circumstances herein related. The bill then charges, that *Betts* not regarding his said several promises and undertakings to *Spurrier*, but fraudulently intending to injure and deceive the complainants, lodged in the office of record the first deed to Miss *Ball*, with whom, either immediately before or shortly afterwards he intermarried. That the said notes have both become due and remain unpaid, *Betts* having totally neglected and refused to pay or to renew the same, and pay the regular and usual interest, &c. although often demanded by the complainants, still refuses to renew the said notes, and pay the said discount, &c. as is provided by the deed of mortgage. *Prayer*, that the deed to Miss *Ball*, (now Mrs. *Betts*,) may be utterly rescinded, annulled and set aside; and that the mortgaged premises may be sold for the payment

of the sum of money in the said mortgage deed mentioned, &c. and for further relief, &c.

The *answers* of *Betts*, and *Elizabeth* his wife, admit the debt due to the complainants, and the deed of mortgage to them as stated in the bill, but they insist that the term of credit given and allowed by the said deed had not expired, and that the complainants were not entitled to ask for a foreclosure of the same. The answer admits that *Spurrier* was requested by *Betts*, a short time before the deed of mortgage to the complainants, to prepare a deed for the purpose of conveying the lot of ground which is mentioned in the said mortgage deed, and to leave the name of the grantee, and the consideration in blank, and that afterwards *Betts* called on *Spurrier*, and desired him to insert the name of *E. Ball*, now the defendant *E. Betts*, as the grantee in the said deed. But *Betts* utterly denies that he requested *Spurrier* to keep the said transaction a secret, or told him that as *E. Ball* was young he had thought proper to make such a provision for her without her knowledge, or that any conversation of that nature ever occurred between *Betts* and *Spurrier*. The defendants aver, that the said deed, executed and delivered by *Betts* to *E. Ball*, (his now wife,) was executed and delivered to her with her full knowledge, approbation and consent, and in consequence of an agreement previously entered into by her and *Betts* upon the eve of their marriage, for a marriage settlement for her, which agreement was made in February or the beginning of March 1819, and in consequence of which agreement the said deed to *E. Ball* was executed by *Betts*. He denies that *Spurrier* told him it would be necessary he *Spurrier*, should be satisfied that the previous deed made to *E. Ball* had been cancelled, or else he would communicate the same to the parties; and he also denies that he promised the said deed should be cancelled, or that he had the deed in his possession, and that *E. Ball* had no knowledge of it, or that any conversation of such a nature occurred. The defendants aver that the said deed was executed and delivered anterior to the execution of the deed for the same property to the complainants. They deny that *Betts* left the said deed with *Spurrier* with the knowledge or consent of *E. Ball*. They admit that *Betts* executed the two mortgages

referred to in the bill, to the complainants. *Betts* denies that he ever pledged his honour, or promised *Spurrier* not to make use of the deed to *E. Ball;* and *Elizabeth* avers, that she does not believe he did, &c. and if he did, it cannot bind her, or affect her rights, where the same was done without her knowledge or consent. They aver that *Elizabeth* refused to marry *Betts* until the said deed from him to her was regularly executed.

The answer of *Priestly* admitted, and confessed all the matters and facts stated in the bill of complaint to be true as there stated, and that he believed the conveyance to *E. Betts*, the wife of *Betts* and co-defendant in this cause, was made for the fraudulent purposes alleged in the said bill.

*Exhibit*—By the complainants—a deed of mortgage from *E. Betts* to complainants, dated the 24th of March 1819, for the lot of ground, to secure the payment of the money in the manner mentioned in the bill of complaint, which mortgage was recorded on the 27th of April 1819. The *exhibit* by the defendants—a deed from *Enoch Betts* to *Elizabeth Ball*, dated the 17th of March 1819, whereby the former "for and in consideration of the sum of four thousand dollars lawful money of the *United States*, to the said *Enoch Betts* in hand well and truly paid by the said *Elizabeth Ball*, at and before the sealing and delivery of these presents, the receipt whereof the said *Enoch Betts* doth hereby acknowledge," &c. the said *Betts* granted and conveyed to the said *E. Ball* a lot of ground in the city of *Baltimore*, No. 111, &c. This deed was recorded on the 9th of August 1819.

A commission issued, and testimony was taken thereunder. That of *Beale Spurrier* was very similar to that stated in the bill, with other additional evidence of what took place between him and *Betts* at a subsequent period, on having called on *Betts* at the instance of *Priestly*. The testimony of *Walter Ball* is, that *Elizabeth Betts* is his sister. That previous to her marriage, he called on *Betts* to know whether he had conveyed to the deponent's sister a sufficiency of property to make her independent of his children, as he had promised to do. He told the deponent he had got the deed, and gave it to the deponent, and said here is what I have given your sister, and

requested the deponent to take it and read it, and said at the same time, he thought it was sufficient to make her comfortable. After deponent had read the deed he replied, he thought it was. The deed was at that time executed and acknowledged by *Betts*. He informed his sister of the contents of the deed before her marriage, which appeared to be satisfactory to her. *Betts* was an elderly man, with a family of four children. *E. Ball* was a young woman. It was at the request of *E. Ball*, the deponent went to examine the deed given to her by *Betts*. The testimony of *William Ball* is, that *Elizabeth Betts* is his daughter; that *E. Betts* addressed her, and he consented to the marriage, provided *Betts* would make her independent of *Bett's* children; and that a few days before the marriage he met *Betts*, and had a conversation with him, and *Betts* mentioned to the deponent that he was clear with Mr. *Priestly*, and that he was then prepared to place the deponent's daughter in the situation which he had promised. *Betts* had given deponent to understand that he was an independent man, though not a rich one, and that he was in a situation to make the deponent's daughter independent of his children. *Sarah Ball* deposed, that *Elizabeth Betts* is her daughter. That *Enoch Betts* did make the deed to her daughter; that the deed was shown to, and read by, the deponent, it having been executed and acknowledged by *Betts;* this was previous to the marriage. That at the time of showing the deed, *Betts* observed, that it would be sufficient to keep her daughter from want, to which the deponent replied yes. That it was with the approbation of her daughter that the deed was examined and read by the deponent. The deponent was determined in her mind that *Betts* should not have her daughter without he gave her a sufficiency to keep her from want in case of his death. When he asked the deponent for her daughter, she observed to him that he was a great deal older than her daughter was; that he might die first, and leave her with a rising generation; and then asked him what was to become of her and her children—to be depending on his children for her support? The deponent intimated to him that he ought to give her something independent of his children. He then replied he would. She then left him, and told her daughter that Mr. *Betts* intended to make her in-

dependent of his children if she was willing to have him. Six or seven days before the marriage, the deponent went and asked him whether he had done that business? He said he had; with that he got the deed and showed it to her, and she read it, and then he said he thought it was sufficient. The deponent replied yes. She went home and informed her daughter of it. That the marriage took place on the 25th of March 1819. Other similar testimony was taken and returned under the commission, but which is unnecessary to be stated.

JOHNSON, Chancellor, (July term 1822.) The object of the bill is to vacate a deed, on the ground of fraud, executed by *Enoch Betts* to *Elizabeth Ball*, with whom he afterwards intermarried, and to obtain a decree for the sale of the property under a mortgage obtained from *Betts* to the *Union Bank*, to secure the payment of a sum of money due from him to the bank, and for which *Edward Priestly*, the other defendant, was responsible to the bank.

On the 24th of March 1819, the mortgage was executed to secure the payment of the sum of $1700. The debt arose on two notes amounting to that sum, which had been discounted at the bank; and three years were to be allowed for the payment of the principal debt, provided *Betts* regularly renewed the notes during that period, and paid the discounts. The bill, (which was filed on the 25th of September 1820, before the three years had elapsed,) alleges that *Betts* had not renewed the notes when due. The mortgage was recorded on the 27th of April following the date.

The bill states, that a short time previous to the execution of the mortgage, *Betts* called on a conveyancer, and requested him to draw a deed, (for the same property included in the mortgage,) and leave the name of the grantee, and the consideration, blank. On the 17th of March 1819, he, *Betts*, waited on the conveyancer, and requested the blank to be filled up with the name of *Elizabeth Ball*, as the grantee, which was done, and the deed on that day executed.

The same conveyancer was afterwards, at different times, requested by *Priestly* and *Betts* to prepare some securities on the property of *Betts* to secure the debt to the *Union Bank*;

that on discovering that part of the property, designed to be mortgaged, was the same comprehended in the deed to *Elizabeth Ball*, the conveyancer, *(Beale Spurrier,)* informed *Betts* that the first deed, (the execution whereof *Spurrier* had by *Betts* been requested to keep secret,) must be cancelled, or he *(Spurrier,)* must inform those interested with the circumstances. *Betts*, who then had the deed in his possession, said it should be cancelled, declaring that *E. Ball* had no knowledge of it; and the deed was left with *Spurrier*. The mortgages were prepared, and a deed written at the instance of *Betts*, to convey his equity of redemption in the same property before conveyed to *E. Ball*, as a substitution for the first deed, observing, he thought it would be in his power to redeem the mortgages. The mortgages and the last deed were then executed. *Betts* was again informed by *Spurrier* that the deed of the 17th of March (the first deed to *E Ball,)* must be destroyed, when *Betts* replied he wished to keep it, as he expected to pay the debt in the course of six months; that he would request the bank not to have the mortgages recorded until the time for recording had nearly expired; and that he preferred recording the first to the second deed to *E. Ball*, and pledged his honour to *Spurrier* not to use the first deed except the mortgage was discharged; on which *Spurrier* permitted him to take and retain the first deed. Not regarding his promises, but as the bill charges, fraudulently intending to injure and deceive, the first deed was lodged for record immediately before or shortly after *Betts* married *Elizabeth Ball*.

The answer of *Betts* admits the request to have the deed prepared with the blanks, and when drawn, at his request, the name of *Elizabeth Ball* was inserted as the grantee; but he denies all the allegations in respect to keeping the transaction a secret, or that he had thought proper to make a provision for *E. Ball*, whom he was about to marry, or that any conversation passed between him and *Spurrier* of the nature that is set forth in the bill. And his wife, by her answer, believes what her husband states is true. Both of them aver that the deed was executed in consequence of an agreement previously entered into between them on the eve of marriage, for a marriage settlement; that the agreement was made in the month of Februa-

ry, or the beginning of March 1819. *Enoch Betts* denies every thing that is alleged about the promise to cancel; and denies that the deed, with the knowledge of *Elizabeth*, was left with *Spurrier;* and avers that the deed of the 17th of March was executed and delivered anterior to the mortgage.

The only consideration of the deed of the 17th of March, is the payment of the sum of $4000, the receipt of which is acknowledged. This deed was recorded on the 9th of August following its date.

This cause has been argued partly in writing and in part verbally, and every attention has been given to the grounds occupied by each in maintenance of the side each espoused; and all the evidence and circumstances of the case, as well as all the authorities relied on, maturely considered. Several questions arise in the cause.

*First.* Was the deed to *Elizabeth Ball*, in point of fact, first duly executed?

*Second.* If first executed, is it available against the complainants? and as the consideration contained in the deed was not paid, can any other be set up in its support?

*Third.* Supposing it competent to give, in support of the deed, evidence of a consideration other than the one contained therein, is there evidence of such a consideration for its execution as can prevail against the complainants?

1. On the first question. It will be perceived, on an attentive examination of the bill, and the answer of *Enoch Betts*, that the allegations, that at the time the mortgage was executed, the first deed was in the possession of *Spurrier*, is not denied by the answer. The answer denies that he, "*Enoch*, left the said deed with the said *Spurrier* with the knowledge or consent of the said *Elizabeth.*" All of which is consistent with the bill; for so far from alleging that *E. Ball* ever consented to the deed being carried to and left with *Spurrier*, she is declared to be ignorant of its existence. What is contained in the bill on this subject is not denied; but the denial applies to what is not charged, and is therefore foreign from the matter in contest.

The evidence of *Spurrier* is explicit on this subject. He swears that *Betts* brought to and left with him, the deed, which

after the three other deeds were executed, on the solemn promise of *Betts* not to use it but on the event of the discharge of the mortgage, he *(Spurrier)* permitted *Betts* to retain the possession of the deed. That is, he returned the deed to him, and permitted him to keep it, only to be used on the event taking place that had been mentioned.

If the evidence of *Spurrier* is true, of which I entertain not the most slight doubt, then in point of fact, the deed of the 17th of March (if it may be denominated a deed) was not delivered to *E. Ball*, or to any other person for her use, when the mortgage of the 24th of March was executed. The delivery, and not the date, is the essential part. The instrument of writing may be a deed without date, but no deed can exist without delivery; until then the act is as incomplete as a paper purporting to be a last will and testament before the death of the maker.

But it has correctly been remarked by the counsel for Mrs. *Betts*, that no act of her husband can invalidate her deed; that once executed, it is free from his control. This position, true in itself, before it can be brought to bear on the cause, requires that the instrument in question must first be established to be a deed. Surely, if from the time it was executed, to the 24th of March, it had been in the exclusive possession of *Betts*, and was then delivered up, in order to give effect to other deeds then executed, it never could be brought, by relation to its date, to control and defeat them. Is there any evidence of the delivery either to *E. Ball*, or to any other person for her?

Her mother, *S. Ball*, proves that "the deed was shown to and read by her." By whom was it shown? Not by *E. Ball*, or any person to whom it was delivered, but by *Betts* himself, then in possession of it, as manifestly appears by the whole of her evidence taken together.

*Walter Ball*, her brother, proves that previous to the marriage he called on *Betts*, who said he had "got the deed, and gave it to the deponent, and said here is what I have given your sister, and requested deponent to take it and read it, and said at the same time, he thought it was sufficient to make her comfortable. After deponent had read the deed, he replied, he thought it was." The deed, as is evident from the whole of his evidence, was then returned to *Betts*; for in his answer to

the fourth interrogatory on the part of the defendants, he says "he informed his sister, *Elizabeth Ball*, of the contents of the deed before her marriage." She would not have been informed of the contents of the deed, if her brother then held it; she would either have read it herself, or had it read to her.

These are the only witnesses in the cause on whom any reliance can be placed to establish a delivery of the deed of the 17th of March, to have been made prior to the mortgage. All the witnesses, it is true, in speaking of the instrument of writing of the 17th of March, call it a deed, as is also done in this decree; but if it was not accompanied with all the solemnities necessary to constitute it such, the appellation of deed will not make it one.

It may fairly be inferred, it never was the intention of *Betts* to give it the binding efficacy of a deed, before the solemnization of marriage; for as the consideration was money, and as he denies all that is stated by *Spurrier* in respect to the marriage, had he parted with the paper, the title to his property, certainly as between him and *E. Ball*, would have been transferred to her, and would have vested in her, although she afterwards refused to marry him; and whether it ever could have been recovered back is problematical.

To constitute a deed, delivery of some kind must be proved. To a third person for the grantee is sufficient; but the casual placing it in the hands of a third person, with the view to let him read it, and then return it, will no more amount to a delivery, than if the grantor had retained in his own hands the paper, and there permitted it to be read. No case has been produced, nor have I been able to find one, by which, on the evidence as here disclosed, the paper of the 17th of March can be established a deed to overreach the mortgage of the 24th of the same month to the complainants.

The execution of the deed, it has been contended, is not called in question by the bill, and therefore need not be proved. The bill, it is true, calls the instrument a deed; but it shows that when the mortgage was executed, it was not in the possession of the grantee, directly or indirectly; and if a delivery is necessary for its validity as a deed, and there was none, its execution cannot correctly be said to be admitted. But if the

opinion given on the first question is not tenable, the second arises.

2. Can evidence of a consideration, other than that contained in the deed be received to support it? This entirely depends on law, and might properly be referred to a court of law, but having expressed an opinion on the first point, which, if correct, ends the cause, I shall, without the assistance of a court of law, determine the other point.

It is well established as a general rule, "that parol evidence cannot be admitted to contradict, add to or vary, the terms of a will, deed, or other instrument of writing." For, to use the language of Lord *Coke*, "it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers, and all others, in such cases, if *nude* averments against matter in writing should be admitted." *Countess of Rutland's* case, 5 *Coke*, 26.

But although the rule, as a general one, is not controverted, and its applicability to prevent different *uses* and *trusts* from being raised, than are contained in the instrument, or to vary the condition of a bond; yet a difference in respect to the admission of parol evidence is alleged in regard to the *consideration* of the instrument itself. Parol evidence cannot vary the uses, &c. but parol evidence may be received to establish a deed by the proof of *another* consideration, consistent with the nature of the consideration contained in the deed or instrument. And, as is argued on behalf of the deed, marriage, as well as money, is in contemplation of law, and in reality a valuable consideration. Therefore, if it appears that the deed was executed in consequence of a previous marriage agreement, it must be supported.

It will be found, on an examination of the authorities, that in some instances you may give evidence of a consideration in addition to that stated in the deed, if the additional consideration is of the same nature. But such evidence is not admissible in every instance. Nor has any case presented itself in my researches, which, on this occasion, have not been slight.

where a deed has ever been supported by the proof of a *consideration consistent* with the nature of that in the deed, except where the *consideration in the deed*, as well as the one proved in addition, was also true.

With what propriety, it may be asked, can it be said, when the deed purports to convey property in consideration of $4000 paid, that you can be permitted to prove that a marriage contract, and not the money, was the inducement or consideration for the conveyance, and at the same time contend that such proof is consistent with the deed? They are as variant as north from south. If the $4000 had been paid for property worth $20,000, the inadequacy of price might of itself induce the belief that the deed was improperly obtained. But to support the deed, the real consideration, as set forth in the deed being true, parol proof of an additional consideration consistent with its nature—such as marriage, might be let in. For as the $4000 were in part the real consideration, the superadding another consistent consideration, the books say, is no variance. But it is believed no book has gone so far as to establish a deed *by another consideration alone*, than the one expressed in the deed. "Where a deed is impeached for fraud, the party charged will not be allowed to prove any other consideration in support of the instrument." 1 *Phillip's Evid.* 426. *Clarkson vs. Hanway*, 2 *P. Wms.* 203. But "the party which complains of the fraud may prove any consideration, however contrary to the averment of the deed, to show the fraudulent nature of the transaction." For there is no danger, say the books, that the introduction of such proof would introduce uncertainty or fraud, "but, that fraud would be assisted by its exclusion, the whole object of the evidence being to expose and defeat a secret fraud." 1 *Phill. Evid.* 424 to 428, and the cases there referred to. 1 *Fonbl.* 202.

As, in this case, there is not the least foundation to suppose the $4000, the alleged consideration of the deed, ever were paid, the evidence going to establish another consideration is clearly inadmissible.

The decision of the court of appeals in *Jones vs. Slubey*, 5 *Harr. & Johns.* 372, bears strongly on this cause.

3. If the evidence of the consideration set up in support of

the deed was admissible, could such a consideration support the deed?

*Enoch Betts*, being largely indebted, wishes to marry. He is an old man, with a number of children; forms an attachment for a young lady, who it would seem would not marry him without obtaining something to make her independent of his children. This he promises to do; and this appears to me to be the *substance* of what is *now termed a marriage contract.* Now let us suppose this promise was made, which I do not question was the case, and she had been informed by *Betts* he had secured to her what would make her independent of his children, and relying on this information she married him, and then discovered no such establishment had been made, could a bill be supported in chancery? Where is that certainty which all contracts demand? What, it might be asked, was he to convey? What and how much would make her so independent? If a bill could not be supported, supposing no paper to have been signed, how could a claim be maintained on such a promise, supposing the paper to have been signed, so as to obtain it from him as a completion of these engagements? It seems to me a dangerous principle to permit a man, involved in debt, by making a promise to settle his property on the woman he intended to marry, to do so, to the ruin of his creditors. On these subjects I express no opinion, except I do not think the public good would be promoted by the encouragement of marriages on such conditions.

That the complainants may obtain the relief they appear justly entitled to—*Decreed*, that unless the defendants shall, on or before, &c. pay, or cause to be paid, to the complainants, the sum of $700, with legal interest on the same from the 25th of April 1819, and the further sum of $1000, with interest as aforesaid, from the 28th of April 1819, until paid, together with the costs of this suit, the property in the deed of mortgage filed in this cause be sold, or such part as will be sufficient to discharge the said sums. And in order to make the said sale, on failure to pay—*Decreed*, that R. J. be and he is hereby appointed trustee, &c. From this decree *Betts* and *Wife* appealed to this court.

The cause was argued at June term 1824, before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and ARCHER, J.

*J. Glenn*, for the Appellants, contended,

1. Under the circumstances of this case the appellees had no right to come into a court of equity to ask relief.

2. The deed to the appellant, *Elizabeth*, was duly executed for a valuable consideration previous to the deed to the appellees.

3. Parol evidence is admissible to support the deed.

The appellants have the superior legal title, and the superior equity. The act of 1766, *ch.* 14, *s.* 5, fixes the time when the deed enured to the benefit of Mrs. *Betts*. It took effect from its date, and gave the legal title to her before the mortgage to the appellees. The deed was delivered before the mortgage; and it was made in consideration of marriage. Any act amounting to a delivery is sufficient to constitute a delivery of a deed. The consideration was marriage, and that is a valuable consideration. 2 *Blk. Com.* 297. *Sugd.* 465, and the cases there cited. *Verplank vs. Sterry*, 12 *Johns. Rep.* 546. A subsequent marriage validates a voluntary deed as against creditors. There was a good delivery of the deed. *Shelton's* case, *Cro. Eliz.* 7. 13 *Vin. Ab.* (K.) 23, pl. 12. *Souverbye vs. Arden*, 1 *Johns. Ch. Rep.* 255. 2 *Rolle's Ab.* 24, l. 28, 45. 4 *Com. Dig.* tit. *Fait*, (A. 3,) 158. There must be fraud to defeat the prior deed. *Evans vs. Bicknell*, 6 *Ves.* 189, 191. *Berry vs. Mutual Insurance Company*, 2 *Johns. Ch. Rep.* 609. The consideration was $4000, as expressed in the deed, and it is in proof that the consideration was marriage, and not a money consideration. Where there is a valuable consideration expressed, another valuable consideration may be averred where there has been no fraud. *Villers vs. Beamont*, 2 *Dyer*, 146. *Mildmaye's* case, 1 *Coke*, 176. *Lord Cromwel's* case, 2 *Coke*, 76. *Vernon's* case, 4 *Coke*, 3. *Peacock vs. Monk*, 1 *Ves.* 128. *The King vs. Inhabitants of Scammonden*, 3 *T. R.* 474. *The King vs. Inhabitants of Laindon*, 8 *T. R.* 379. *Sugd.* 87. *Fancis's Max.* No. 2. 1 *Fonbl.* 138. The appellees had notice of the deed, and they must take subject to that deed. The conveyancer was the agent of the appellees.

*Le Neve vs. Le Neve*, 3 *Atk.* 646. If there is a defect in the deed to Mrs. *Betts*, equity will make it good. 1 *Madd.* 41.

*R. Johnson*, for the Appellees. 1. There was no notice to the agent. The conveyancer was as much the agent of Mrs. *Betts* as of the appellees. He knew that *Betts* was indebted to the appellees. If Mrs. *Betts*, through the agent, knew that fact, was the deed to her an effectual conveyance under such circumstances? It would have been a fraud on her in taking the deed. Was there a delivery of the deed? It is the delivery that makes it the deed of the party. 2 *Blk. Com.* 307. A deed takes effect from its delivery. When was this deed delivered? There is no pretence that it was delivered to Mrs. *Betts*, or that she ever saw it. It was to be the deed of *Betts* when the marriage took effect. The deed was not left as in *Shelton's* case, *Cro. Eliz.* 7, but *Betts* put the deed in his pocket, and took it away with him after he had executed it. There is no evidence to show that there was any delivery. The grantor took the deed to the clerk's office to be recorded, and it was then, and not before, legally delivered. The act of 1766, *ch.* 14, *s.* 5, in speaking of the date of the deed, means from the time of the delivery. The day of the date is the day of the delivery, *Jackson vs. Bard*, 4 *Johns. Rep.* 230.

2. Can parol evidence be received to prove a different consideration than that stated in the deed? The chancellor in his decree has correctly laid down the rule. The consideration of marriage, is not of the same nature as that in the deed. If the parol evidence is to admit that the consideration was marriage, and not money, it would be to change the consideration wholly from that stated in the deed. 2 *Blk. Com.* 338. What the deed is, and what it will be if the evidence is admitted—Where it is a money consideration, then it is a bargain and sale—If marriage, then the nature of the deed will be changed into a covenant to stand seized to uses. Can such a doctrine as this be admitted? A deed of bargain and sale has certain requisites peculiar to itself, which the evidence would have the effect to change and wholly defeat. Independent of the Statute of Frauds, the evidence could not be admissible. The cases cited by the appellants' counsel, are where there is a pecuniary con-

sideration, and other pecuniary consideration is proved; but none of them go to say you can change the consideration, and substitute another in its place, although they both be valuable considerations. 1 *Phill. Evid.* 426, (483.) *Betts* executed the deed with a fraudulent design, and the consideration stated in the deed was not paid. If the evidence is admitted, then the fraud will be consummated. *Clarkson vs. Hanway*, 2 *P. Wms.* 203. *Watt vs. Grove*, 2 *Sch. & Lef.* 501. *Jones vs. Slubey*, 5 *Harr. & Johns.* 372. 2 *Com. Dig.* tit. *Bargain & Sale*, (B 10,) 64.

*Taney*, in reply. The deed, under which the appellants claim, purports, on the face of it, to be made for a money consideration only. It appears by the answer and evidence, that no money was in fact paid, and that the deed was in truth made in consideration of marriage only, and that the marriage took effect. If the deed was made without consideration, or was merely voluntary, it is fraudulent and void against the appellees, who were creditors at the time. The consideration mentioned in the deed is admitted not to have been paid. It is, therefore, fraudulent and void, unless some other valuable consideration can be proved. And the question is, can the appellants be permitted to prove the consideration of marriage, upon which, in truth, the deed was made? If by the rules of equity they are permitted to offer such evidence, then the deed is not fraudulent, but is a good deed for a valuable consideration—that is, in consideration of marriage. It is insisted that the evidence is admissible.

1. The general rule is, "that although a particular consideration is mentioned in the deed, yet an averment may be made of another consideration which stands with the consideration expressed, and is not repugnant to it." The rule is stated in the words of Ld. *Coke*, as repeatedly recognized in his reports. *Mildmaye's* case, 1 *Coke*, 176. *Lord Cromwell's* case, 2 *Coke*, 76. *Vernon's* case, 4 *Coke*, 3. *Bedel's* case, 7 *Coke*, 40. In all of these cases, *Villars vs. Beamont*, 2 *Dyer*, 146, is relied on as the leading case, and is recognized as authority. The same rule is recognized in *Sug. Vend.* 97, 98, (ed. 1820,) and in *Phil. Evid.* 425, &c. The rule in *Sugden* is, "that

parol evidence may be given of *collateral and independent* facts, which tend to support the deed," provided it is not offered to vary the agreement, and is consistent with the deed.

2. The case at bar is in all respects within the words and spirit of the rule, as above established. The evidence offered is to prove "a collateral and independent fact, tending to support the deed, and consistent with the deed, and does not vary or control it." It is another consideration consistent with the one expressed in the deed, which, in the language in *Vernon's* case, 4 *Coke*, "*stands with the consideration expressed.*"

3. As the general rule embraces the case, it is incumbent on the appellees, who object to the evidence, to show the principle which excepts it out of the general rule. He who alleges an exception, must prove the exception. It is said, that there is no case in which the additional consideration has been proved, but where the consideration expressed was proved also; and hence it is inferred, that the consideration expressed in the deed must be first proved, in order to let in the proof of the additional consideration. It is perhaps a sufficient answer to this argument to say, that there is no case in which the additional proof was rejected, because the consideration expressed was not proved. The want of a case, therefore, on the subject, cannot be supposed to establish a principle. The argument above stated on the part of the appellees, would prove that the testimony ought to be admitted, quite as well as it proves that it ought to be rejected. The argument of the appellees is briefly this—"There is no case in which the additional consideration was *admitted* where the consideration expressed was not proved; therefore, the additional consideration cannot be *admitted* where the consideration expressed is not proved." Now, try the argument on the other side. There is no case in which the additional consideration was *rejected*, where the consideration expressed was not proved; therefore, the additional consideration cannot be *rejected* where the consideration expressed is not proved. But in truth, the argument on both sides is illogical and unsound. The mere want of a case proves no principle. If the want of a case cannot establish a principle, neither can it narrow or limit a known and admitted principle. And if these positions be right, it follows that the ap-

pellees have failed to show that the case at bar is an exception of the general rule. If they fail to show the exception, the case being within the general rule, the evidence is admissible.

4. It is objected, that when it is proved that the consideration expressed was not paid, that then the deed is fraudulent, according to the proof it becomes void and inoperative, and the party claiming under it will not be permitted to re-establish it by showing another consideration. The answer to this is already given. It is an attempt by the appellees to except this case out of the general rule; to narrow the general rule by incorporating with it the principle above stated. We show the general rule as settled and continually recognized; and we show the authorities on which it rests. If the rule is to be narrowed, or the case at bar to be excepted out of it, the appellees' counsel must show the exception. He must produce the authority which establishes the new principle he seeks to engraft on the rule. He has failed to do so. He cannot, therefore, entitle himself to the exception or limitation for which he contends. Again: The argument on which the appellees' counsel rests the above position, is not sound—it proves too much. The principle, on which the above position rests, is this: that where a party impeaching a deed, shows by proof *de hors* the deed, that it is fraudulent, and therefore void, the party claiming under the deed thus nullified, shall not be permitted to offer evidence *de hors* the deed, to re-establish and give life to the deed. If this position were true, then the following case would be within it. Property worth $20,000 is conveyed, and the consideration expressed is $5. A creditor of the grantor seeks to vacate the deed. He proves that he was a creditor at the time to the amount of $10,000; that the property conveyed was worth $20,000. Upon this proof alone it is clear that the deed is fraudulent. It is nullified by evidence *de hors* the deed. May not the party claiming under the deed prove that he actually paid $20,000? All of the cases admit he may do so; yet this is evidence *de hors* the deed, and is offered to re-establish and give life to it; or to speak more correctly, it is offered to show that the deed was always good, was never null and void. It may be said in the case supposed, the consideration expressed in the deed was actually paid—in the case at bar

it was not. This is a difference in fact, it is true; but a difference in fact is not necessarily a difference in principle. The principle upon which the deed is made void in both cases is, that the deed is a fraud on the creditor. It matters not by what peculiar chain of facts it is shown to be a fraud upon the creditor. It is the fraud, however, proved, that makes it void; and if it is not fraudulent, whatever may be the facts, it is good, if in other respects regularly executed. Neither does the admissibility of the evidence depend on the payment or nonpayment of the consideration expressed. If the evidence is repugnant to the deed, it is not admitted. If it is not repugnant it is admitted. Whether it is repugnant or not, must depend on the words contained in the deed itself, or the writing itself, and not on matter *de hors* the deed; not on matter appearing by parol out of the deed. Its repugnancy, therefore, does not depend on the question, whether the consideration expressed was or was not paid, but on the question whether the parol evidence is consistent with the writing? In the case at bar the testimony is surely quite as consistent with the deed, as in the case above supposed, and if admissible in the one case is equally admissible in the other. Indeed, the only and true question is, how far parol evidence is admissible where there is an instrument of writing? It is discussed and decided on this principle in the case of *Villers vs. Beamont*, 2 *Dyer*, 146, and in the cases in *Coke's Reports* already cited; and it is classed under this head in *Sugden* and *Phillips* in the passages already referred to. It must, therefore, depend not on the payment of the consideration expressed, but on the words of the deed, that is, on what consideration is expressed in the deed; and so indeed it is decided in so many words in *Lord Cromwel's* case, 2 *Coke*, 76. "The consideration must stand with the consideration *expressed*," that is, the consideration named in the deed; and no question is made about whether it has been paid or not. And in *Mildmaye's* case, 1 *Coke*, 176, it is decided, that the consideration of marriage is consistent with a money consideration; and the other cases cited affirm the same doctrine.

5. This argument is upon the admission that there is no case decided where the consideration expressed was not paid. If we are right in the principles before urged, the absence of such

a case furnishes no argument against us. But the appellees' counsel, in assuming that fact, is not strictly correct. In *Reade vs. Livingston*, 3 *Johns. Ch. Rep.* 481, the consideration expressed in the deed was money only; and the consideration set up was marriage, it being admitted that no money was paid. It is true, that the point now under consideration does not appear to have been raised in the argument, nor was it directly decided by this court, yet the case necessarily presented the very point now under discussion; and as that case was fully argued, and is most ably decided by Chancellor *Kent*, upon great consideration, it cannot be supposed that the eminent counsel, and distinguished chancellor, would entirely overlook a point which met them at the very threshold of the discussion, and which, if the evidence be not admissible, decided the case at once, and relieved it from the many interesting and difficult questions which appear to have been so elaborately considered, and so well decided by the chancellor. The whole argument of Chancellor *Kent* proceeds on the assumption that the evidence is admissible. It may be inferred from this that it was considered a settled point, and no doubts entertained about it at the bar, or by the court. If this inference be just, it sanctions, in all respects, the admissibility of the evidence as contended for by the appellants. It is indeed hardly possible to believe, that the point was overlooked or forgotten; for the very same principle was discussed and decided upon by Chancellor *Kent*, in *Hildreth vs. Sands*, 2 *Johns. Ch. Rep.* 35, only about two years before the case of *Reade vs. Livingston*. The chancellor's decision is not on the precise point or the precise facts now under discussion, but it involved the same general principle. It was decided according to all the authorities, and supports the principle as contended for on the part of the appellants. This case brings us to the only exception to the general rule; which exception is recognized in the case of *Hildreth vs. Sands*.

6. It may be admitted, that where a deed purports to be for a *valuable consideration*, it cannot be set up as a *gift* or *voluntary* conveyance. This is the doctrine laid down by Ld. *Hardwicke* in *Bridgman vs. Green*, 2 *Ves.* 627, 628. But even there it is subject to certain limitations, and is not to be taken as universally true between all parties who may seek to

invalidate it. In *Clarkson vs. Hanway*, 2 *P. Wms.* 203, the principle last stated is decided; and this, which is the oldest case upon the subject, may be considered as furnishing the principle by which the case of *Bridgman vs. Green*, and the subsequent cases, have been governed. In the case of *Clarkson vs. Hanway*, the deed not only purported to be for a valuable consideration, but was insisted on as such in the answer. In *Hildreth vs. Sands*, the deed purported on the face of it to be for a valuable consideration, and was also insisted on as such in the answer; and the chancellor's opinion confirms the principle as above stated, with this additional limitation, that it must be *"brought forward,"* that is, *insisted on in the answer* as founded on a valuable consideration. The case of *Watt vs. Grove*, 2 *Sch. & Lef.* 492, 501, will be found not to impair the principles we have stated. The result of all of these cases, (and they are believed to be the only ones that bear immediately on this part of the case,) is to make the exception even still more limited in its operation than is admitted at the head of this division of the subject. The true extent, as proved by the authorities cited, appears to be this—Where the grantor was a weak man, liable to be imposed upon, or from his relative situation was liable to the influence of, or to be imposed upon by, the grantee, in such cases, if the deed appears on the face of it to have been for a full and fair valuable consideration, then the grantee shall not be permitted to set it up as a gift. The cases of *Clarkson vs. Hanway*, *Bridgman vs. Green*, and *Watt vs. Grove*, were all cases of this description, and decided upon principles that are not applicable to any other class of cases. The case of *Hildreth vs. Sands*, is indeed a case of a different description, and the deed is impeached by a condition, not on the ground of imposition on the grantor, but as a fraud by the grantor upon the creditor. In that case, however, the defendant had put his defence in his answer, "upon the fact of a fair purchase for an adequate price," and it is upon that ground that the chancellor rules the evidence to be inadmissible. This case, therefore, does not enlarge the exception beyond what is warranted by the *English* authorities. It is very clear that a defendant cannot be permitted to put his defence on one ground in his answer, and another in his evi-

dence. If this view of the subject be right, the exception would not apply to cases, where the deed, on the face of it, was for a consideration merely nominal, and obviously intended merely to give the deed a legal operation; nor to cases where a creditor claimed to vacate the deed as a fraud upon him, unless the defendant in his answer alleged the consideration in the deed to be the true consideration. But if these views are mistaken ones, yet it seems perfectly clear, that none of the cases, nor even the arguments of the court in pronouncing the judgment, when the whole argument is taken together, carry the exception beyond the limits admitted at the head of this division of the subject. If the cases have carried the exception no further, there is no principle settled in them which requires it to be carried further. For if the danger of perjury is the objection to the testimony, there is precisely the same danger where an inadequate price is mentioned in the deed, and parol evidence admitted to prove that a larger sum was paid; yet it is agreed on all hands that this may be done. And if inconsistency with the words of the deed be the objection, the proof of the consideration of marriage is no more inconsistent with the deed, than the proof of an additional money consideration, where a smaller money consideration is the only one expressed. And when the case of *Watt vs. Grove*, is carefully examined, it will be found, that not only an additional payment of money may be proved by parol, but the payment of money upon a contract different from that recited in the deed, and distinct from that on which the deed purports to have been made. It results, therefore, 1st. That by the general rule the evidence of the consideration of marriage is admissible in the case at bar. 2d. That the exception to the rule, does not embrace it.

The cases of *Watt vs. Grove*, and *Peacock vs. Monk*, remain to be examined, and will be found not to impeach the principle insisted on by us. In *Watt vs. Grove*, the consideration expressed in the deed was money—the additional consideration was also money. The remarks of Lord *Redesdale* must, therefore, be considered as applicable to that class of cases. He speaks of the danger of parol evidence, but does he say the evidence offered was inadmissible? On the contrary, in speak-

ing of the additional consideration alleged, he says, "it should be proved by the most decisive testimony." And he decides against the deed, not because the evidence was inadmissible, but because the testimony was not sufficient to prove the fact. Another important part of this case ought not to be overlooked. The chancellor decides that a contract recited in the deed is falsely stated as the original contract, and that, too, by the grantee, whose interest was to be advanced by the misstatement, and who had himself prepared the instrument. The additional evidence was offered to show, not the truth of the recital, but to show another and a different contract, by which the original one had been afterwards changed to the one recited; yet this evidence he held to be admissible.

If the evidence here stated was admissible, in what respect can the case at bar be supposed to differ in principle? Here the consideration, mentioned in the deed, was not paid, and another valuable consideration is offered to support the deed. The deed was not prepared by Mrs. *Betts* or her agents, and she is not, therefore, responsible for a false recital of the contract. In *Peacock vs. Monk*, 1 *Ves.* 128, the parol evidence was admitted; but there was no consideration expressed in the deed, and the chancellor says, *arguendo*, that where a particular consideration is expressed, it is a negative of any other, unless it is added "for other considerations." It is not often that the opinions of Lord *Hardwicke* can be questioned, and perhaps in this case his words may not be accurately reported. For *his dictum* here is contrary to the judgment of the court in the case of *Villers vs. Beamont.* And the authority of the case of *Villers vs. Beamont*, is sanctioned by the cases in *Coke's Reports*, where it is always referred to as settling the law on this point. *Phillip's Evid.* 426, *(note.)* Indeed, the principle established by the case of *Villers vs. Beamont* has never been shaken by any subsequent judgment, and is not questioned by the chancellor in the case now at bar.

In addition to the cases already cited, the following are also referred to in maintenance of the same principles. *The King vs. Inhabitants of Scammonden*, 3 *T. R.* 474. *The King vs. Inhabitants of Laindon*, 8 *T. R.* 379. *Eppes vs. Randolph*, 2 *Call's Rep.* 125. *Duval vs. Bibb*, 4 *Hen. & Munf.*

113. In *Eppes vs. Randolph*, the consideration expressed in the deed to *David M. Randolph*, was natural love and affection, and for his advancement in life. If there was no other consideration, the deed was voluntary and fraudulent against the creditor. The evidence offered was, that it was in consideration of marriage; and the evidence was held to be admissible. And the case of *Duval vs. Bibb*, refers to and recognizes the decision in *Eppes vs. Randolph*. The authorities before cited and remarked upon, are believed to be the only cases bearing upon the principles now in discussion. The decisions are all consistent with each other. It is insisted that they establish the principles we contend for, and show the evidence of the consideration of marriage to be admissible.

If the deed to Mrs. *Betts* be a fraud upon the bank, the deed to the bank, was equally a fraud upon her. The bank and Mrs. *Betts*, were both innocent purchasers for a fair and valuable consideration. If a nominal and inadequate or false money consideration had been stated in the deed to the bank, it is clear that they might have shown the true consideration in money. It would be a severe rule *of equity*, if Mrs. *Betts* who is equally innocent,—equally a purchaser—should yet be precluded from the like privilege, when it involves on his part no more danger of perjury, and is no more inconsistent with the deed, than it would have been in the case before supposed, on the part of the bank. The authorities do not lead to such a conclusion, nor do they support such a rule, and it is hoped that it will not now be established in this court.

The act of 1766, *ch.* 14, *s.* 5, by a true construction, means the date of the deed as therein expressed. This is evident from other parts of that act. 2 *Com. Dig.* 64. The act then fixes the date of the deed, and as the prior title was in Mrs. *Betts*, it is of no consequence when the deed was delivered. The question is, whether the appellees have a superior equitable title, Mrs. *Betts* having the prior legal title? The deed to her must be taken to be a true deed.

*Curia adv. vult.*

STEPHEN, J. at the present term, delivered the opinion of the Court. In deciding the question which arises in this case,

no little difficulty has been felt, from the contrariety of opinions which have been expressed by judges of the greatest eminence and distinction, in cases very analogous, if not exactly similar to the present; and the importance of the principle now to be established as a rule of evidence, merits the most full and deliberate consideration. The question then presented to this court for their adjudication, is simply this. Can marriage be given in evidence as the consideration of a deed of bargain and sale, which is expressed to be made for a money consideration only? The facts of the case are as follows: *Enoch Betts* being considerably indebted to the *Union Bank of Maryland*, and being about to be married to *Elizabeth Ball*, on the 17th of March 1819, executed a deed, by which he conveyed to her, and her heirs, a lot or parcel of ground in the city of *Baltimore*, for the consideration mentioned in said deed, of $4000. On the twenty-fourth day of the same month, and the same year, for the purpose of securing the payment of $1700 to the *Union Bank of Maryland*, he executed to the said bank a deed of the same lot or parcel of ground, in trust, to sell the same for the payment of said debt, upon the terms and conditions therein specified. On the 25th of September 1820, *The President and Directors of the Union Bank of Maryland* filed their bill in the court of chancery, for the purpose of vacating and annulling the above mentioned deed to *Elizabeth Ball*, upon the ground that they had no knowledge of its existence, at the time the aforesaid deed was made to them. It is admitted that the consideration of $4000, specified in said deed, never was paid; but it is contended that the deed of conveyance may be supported, by proving that the consideration in truth was marriage, and that such proof is legally admissible. It is not deemed necessary to enter into a more full detail of the facts and circumstances belonging to this case; because if the proof that marriage was the real consideration, is excluded by the rules of evidence upon the subject, the chancellor's decree, ordering a sale of the property for the benefit of the bank, under the deed of the 24th of March 1819, and annulling that of the 17th of March of the same year, to *Elizabeth Ball*, now *Elizabeth Betts*, ought to be affirmed. As has already been remarked, the authorities upon this part of the law of evi-

dence are contrariant, and cannot be reconciled. There is, however, one great and leading principle in the law of evidence relative to this subject, in the affirmance of which they all concur. It is this, that no evidence is admissible which contradicts the deed. In *Maigley vs. Hauer*, 7 *Johns. Rep.* 341, where it was attempted to prove by parol evidence an additional consideration to the one expressed in the deed, the court say, "it is a settled rule, that where the consideration is expressly stated in a deed, and it is not said also, and for other considerations, you cannot enter into proof of any other, for that would be contrary to the deed. This was so decided by this court in *Schermerhorn vs. Vanderdeyden*, 1 *Johns. Rep.* 139, and again in *Howes vs. Barker*, 3 *Johns. Rep.* 506. The same rule prevails in equity, according to the cases of *Clarkson vs. Hanway*, 2 *P. Wms.* 203, and of *Peacock vs. Monk*, 1 *Ves.* 127; and the remedy for the party, if the deed be contrary to the truth of the case, is by seeking relief in equity against the deed, on the ground of fraud or mistake, as was intimated in the case of *Howes vs. Barker*, and as was adopted in the case of *Filmer vs. Gott*, 7 *Bro. Parl. Cas.* 70." In the case of *Peacock vs. Monk*, 1 *Ves.* 128, a bill was filed, claiming the benefit of a trust under a deed, and the point was, whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord *Hardwicke* held, that the proof ought to be read. "It differed, he said, from the common case, upon which the objection is founded, for to be sure, where any consideration is mentioned, as of love and affection only, if it is not said also, for other considerations, you cannot enter into proof of any other; the reason is because it would be *contrary* to the deed, for when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." Thus it appears that the supreme court of *New-York* have adopted the principle established by Lord *Hardwicke*, and excluded the proof of any other consideration, where one is expressed in the deed, and it is not said for other considerations, on the ground that the admission of such proof would be *contrary* to the deed. This doctrine is certainly not reconcileable to the decision made

in *Villers and Beamont*, 2 *Dyer*, 146. In that case the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred, and found by the jury, that the indenture was made "as well in consideration of marriage, (to make it a jointure and bar dower,) as of the said sum of money;" and it was adjudged, that although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it. Which decision has since been sanctioned by Lord *Coke*. Thus it appears that both these conflicting decisions concur in the principle, as indisputable law, that no averment of any consideration out of the deed can be made when it would tend to contradict the deed. 1 *Phillip's Evidence*, 425, 426.

It is not intended by this adjudication to recognize and adopt the rule of evidence as laid down by either of those high authorities, but simply to decide the question involved in this case upon the peculiar facts and circumstances which belong to it. It is admitted that the consideration mentioned in the deed now before the court, was merely nominal, and never was in fact paid. Can the party then, claiming under it, be permitted to prove that the consideration expressed in the deed was not the true consideration, but that the consideration was marriage? Upon a careful examination of the authorities relative to this subject, it appears that the greatest extent to which they have gone, has been to allow an additional consideration to be proved, which is not repugnant to the one mentioned in the deed. But where a deed is impeached for fraud, the party to whom the fraud is imputed will not be permitted to prove any other consideration in support of the instrument. 1 *Phillip's Evid.* 426. The case of *Clarkson vs. Hanway*, 2 *P. Wms.* 203, is to the same effect. In that case the Master of the Rolls says, "judging upon the face of a deed is judging upon evidence which cannot err; whereas the testimony of witnesses may be false." It is the consideration expressed in the deed impeached as fraudulent, which excludes the proof of any other consideration in support of it, and not the circumstance that the party charged with the fraud has relied upon such consideration in his answer, although such reliance might render the proof

still more objectionable, because he had thereby put his defence upon the same ground. But in this case the proof that marriage was the real consideration, and not money, as mentioned in the deed, was inadmissible, as being contradictory to the language of the instrument, and not an averment of another consideration, not inconsistent with, but additional to the one expressed. In 1 *Phill. Evid.* 426, it is said, that the rule which the authorities appear to have established is, "that although a consideration is expressed, some other *additional* consideration may be shown not inconsistent with the former." The consideration then, which was offered to be proved in this case, (though a valuable one,) not being in addition to the one expressed, but as a substitute for it, was repugnant to the averment of the deed, and upon the admitted principle, was inadmissible as being contrary to it.

To give the rule a greater latitude would, it is conceived, be repugnant to the general principles and policy of the law in relation to titles to real property, the evidences and muniments of which are required to be in writing, and enrolled for public inspection and information in cases of contracts made relative thereto.

The objection, that the deed to Mrs. *Betts* only took effect from the time of its delivery, cannot be sustained. As a general principle of the law, there is no doubt that delivery is essential to the legal existence and validity of a deed; but our legislative enactment puts that part of the controversy at rest, by declaring the deed to be efficient and operative from the time of its date.

It has been doubted whether the deed could be supported, even if proof that marriage was the consideration could be received. That ante-nuptial settlements, made in consideration of marriage, are good even though the party be then indebted —See *Reade vs. Livingston*, 3 *Johns. Ch. Rep.* 494, and the cases there cited; but as the evidence, that marriage and not money, was the true consideration of the deed in this case, is not admissible, it follows that the decree of the chancellor must be affirmed.

MARTIN, J. *dissented.*

DECREE AFFIRMED.

## OLIVER *vs.* GRAY.—June 1827.

The act of limitations, (1715, *ch.* 23,) does not extinguish the debt, but only bars the remedy. An acknowledgment of a debt, or a promise to pay it, by the defendant, within the time prescribed, is sufficient to revive the action.

*Held*, 1. That the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only restores the remedy.

As to what promises or acknowledgments will take a case out of the act of limitations—

*Held*, 2. That the promise need not be absolute, but a conditional promise is sufficient; and in such case it is incumbent on the plaintiff to show at the trial, either a performance of the condition, or a readiness to perform it.

*Held*, 3. That the acknowledgment must be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt a defendant from a moral obligation to pay.

*Held*, 4 That such an acknowledgment, accompanied with a naked refusal to pay, or a refusal and an excuse for not paying, which in itself implied an admission that the debt remained due, and furnished no real objection to the payment of it, is sufficient.

*Held*, 5. That any unqualified acknowledgment, &c. with no other excuse for not paying than a reliance on the bar created by the act of limitations, is sufficient to take the case out of the act.

*Held*, 6. That the acknowledgment may be in whole, or in part.

*Held*, 7. That it is sufficient if it be after bringing the suit.

*Held*, 8 An admission that the sum claimed has not been paid, is not sufficient to take a case out of the act of limitations, without some further admission, or other proof that the debt once existed.

*Held*, 9. The acknowledgment need not be made to the plaintiff himself, but may be made to any body else.

*Held*, 10. It is for the court to decide what kind of promise or acknowledgment is sufficient to take a case out of the act of limitations; and the evidence offered to prove such promise or acknowledgment, is proper to be submitted to the jury, as in in other cases, under the direction of the court.

Every acknowledgment which is offered to take a case out of the act of limitations, must be taken all together; and no evidence can be received, to turn a denial of the existence of a debt into an acknowledgment of a subsisting liability, by proving that the party making the admission was mistaken in supposing the debt to have been paid.

Where the plaintiff chooses to introduce the defendant's declarations to take a case out of the act of limitations, he must be content to take them as they are, and cannot be permitted to disprove them by other evidence.

APPEAL from *Baltimore* County Court. This was an action of *assumpsit* brought by the appellant, *Robert Oliver*,

surviving partner of *John Oliver*, against the appellee, and one *Robert Taylor*, (who was returned *non est*,) for money had and received; for money lent and advanced; for money laid out, expended and paid; on an *insimul computassent*, and on a promissory note. The writ was issued on the 14th of March 1823. The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*. To which there were the general replications, and issues joined.

At the trial the plaintiff read in evidence the following promissory note, which was admitted to be signed by the defendant *Gray*, in the name of *Gray* and *Taylor*, in the manner as thereby appears, in his own proper handwriting, and by him delivered to *Robert* and *John Oliver*, at the time it bears date. And it was also admitted that the defendant, *Gray*, and *Robert Taylor* the other defendant, who was returned *non est inventus* on the original writ in this cause, were at the time of the execution of the said note, and for some time before and after the execution thereof, partners in trade, and carrying on trade and commerce under the name and firm of *Gray* and *Taylor*. Which said note is as follows:

"Dollars 5000. *Baltimore*, 14th October, 1813.

On demand we promise to pay to the order of *Robert* and *John Oliver*, five thousand dollars, with legal interest from this date, for value received.

*Gray & Taylor.*"

The plaintiff also offered in evidence, that the defendant, *Gray*, in the year 1816, paid the interest due on the said note; and that about one year, or one year and an half after the said interest was paid, the witness, as the agent of *Robert* and *John Oliver*, called on the defendant for the interest then due, and that the defendant answered that he had paid the last interest out of his own individual funds, and that he was unable to pay the interest then demanded. That the defendant resided in this state, near *Baltimore*; that the said house of *Gray* and *Taylor* resided in the city of *Philadelphia*, and failed in 1815 or 1816. The plaintiff further offered in evidence, by *John Purviance*, Esquire, a competent witness, that some time after

*Gray* and *Taylor* failed, and had executed the deed of trust for the benefit of their creditors, upon the plaintiff's expressing much dissatisfaction at his being excluded from the benefit of said deed of trust, the defendant said he had excluded him from the belief that he was paid out of the securities in his hands; that he did not consider *Gray* and *Taylor* indebted to the plaintiff, but that as the plaintiff was dissatisfied, he would be very glad, if it was not too late, that he should be permitted to come in as one of the creditors of *Gray* and *Taylor*, and the defendant said he would write a letter to *Philadelphia* to ascertain whether this arrangement could be made, and to inquire of counsel in *Philadelphia*. It was, however, the opinion of the counsel, who was consulted, that it was too late, and the plaintiff was excluded from all benefit of the deed of trust. That since this suit was pending, the defendant said to the said witness, frequently, that he regretted that the plaintiff was excluded from the said deed of trust, and wished he had been allowed to come in for his claim under the said deed; but always added, that he did not consider that he was indebted to the plaintiff, because the plaintiff had it in his power to have saved himself, with the sureties received from *William Taylor*, and ought not, therefore, to have looked to him for the money. The defendant also, in these latter conversations, stated the hardship of his condition; that he was poor, and no benefit could result from a recovery, if the plaintiff succeeded in establishing his claim. That his partner too was poor; and that his partner, who was sued by the plaintiff in *Philadelphia*, complained of the situation in which the defendant had placed him with the plaintiff, by not including him among the creditors in the deed of trust. And the defendant stated in one or more of the conversations on the subject with the witness, that he understood from the plaintiff himself, that he had securities in his possession sufficient to cover the amount of his claim against *Gray* and *Taylor*, as well as *William Taylor*. The plaintiff further offered in evidence, that he was not paid by the securities referred to in the preceding conversation, and that *William Taylor* was still indebted to the plaintiff in a large sum of money, although the ship *Orozimbo*, hereinafter mentioned, had been sold to the

best advantage. The plaintiff further read in evidence the endorsement on the bill for discovery, hereafter inserted, and the answer of the defendant to the said bill; which said bill and answer here follow: [The bill here referred to was filed in 1819, in *Baltimore* county court, sitting as a court of equity, by *Gray* and *Taylor*, against *Robert* and *John Oliver*, for a discovery respecting the ship *Orozimbo*, &c. The answer thereto, of *R. Oliver*, was filed in 1824. But as they do not appear to be material in the decision of this cause, they are omitted here.] It was admitted that *Robert* and *John Oliver*, mentioned in the said bill, and the payees in the above mentioned note, are the same persons, and that *Edward Gray* and *Robert Taylor*, mentioned in the said bill, and who are plaintiffs in the said bill, are the same persons against whom the original writ issued in this cause. The defendant then prayed the opinion of the court, and their direction to the jury, that upon the evidence above stated the plaintiff is not entitled to recover on the *second* and *third* issues joined in the cause. Which opinion and direction the Court, [*Hanson* and *Ward*, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

*Latrobe*, for the Appellant, contended, 1. That the statute of limitations operates to create a presumption of payment only, and does not extinguish the original debt.

2. That what amounts to an acknowledgment of a debt to take it out of the statute of limitations, is to be left to the jury.

3. That the conversations of the defendant in this case, amount to such an acknowledgment as is sufficient to take the case out of the statute.

On the *first* point, he cited *Sturges vs. Crowninshield*, 4 *Wheat.* 207. *Quantock vs. England*, 5 *Burr.* 2630. *Clementson vs. Williams*, 8 *Cranch*, 72. *Lloyd vs. Maund*, 2 *T. R.* 760. *Mountstephen vs. Brooke*, 5 *Serg. & Low.* 245. *Leaper vs. Tatton*, 16 *East*, 422. *Halladay vs. Ward*, 3 *Campb.* 32. 2 *Stark. Evid.* 892, 893, 895.

On the *second* point—*Lloyd vs. Maund*, 2 *T. R.* 760. *De*

*La Torre vs. Barclay*, 2 *Serg. & Low.* 270. *Bicknell vs. Keppel*, 4 *Bos. & Pull.* 20. 2 *Stark. Evid.* 896. *Bryan vs. Horseman*, 4 *East*, 604. *Baillie vs. Inchiquin*, 1 *Esp. Rep.* 435. *Smith vs. Ludlow*, 6 *Johns. Rep.* 267.

On the *third* point—*Bryan vs. Horseman*, 4 *East*, 599. *Trueman vs. Fenton*, 2 *Cowp.* 548. *Lawrence vs. Worrall*, *Peake's N. P. Cases*, 93. 2 *Stark. Evid.* 893. *Baillie vs. Ld. Inchiquin*, 1 *Esp. Rep.* 435. *Leaper vs. Tatton*, 16 *East*, 420. *Clarke vs. Bradshaw*, 3 *Esp. Rep.* 155. *Jackson vs. Fairbank*, 2 *H. Blk.* 340. *Wood vs. Braddick*, 1 *Taunt.* 104. *Smith vs. Ludlow*, 6 *Johns. Rep.* 267. *Dean vs. Pitts*, 10 *Johns. Rep.* 35. *Anderson vs. Sanderson*, 3 *Serg. & Low.* 190. *Ward vs. Howell, et al.* 5 *Harr. & Johns.* 60, 61. *Barney vs. Smith*, 4 *Harr. & Johns.* 485. *Norris's Peake*, 420, &c.

*Raymond*, for the Appellee. Independent of the plea of the statute of limitations, the plaintiff cannot recover on the general issue. That plea is a bar to his action.

1. The statute of limitations creates a presumption of payment, which the debtor may waive; but unless he does so, no other evidence can be received to rebut that presumption. The debtor may waive the statute by not pleading it. He may promise to pay the debt. In this case the defendant has not waived the statute in either of those ways. But it has been said that his acknowledgment is a waiver. The making an acknowledgment is not a waiver of the statute. It is not a promise to pay the debt; but only evidence from which the jury may infer a promise. If a special verdict found that the defendant acknowledged the debt, but no promise is found, a judgment could not be rendered.

2. It has been contended, that what amounts to an acknowledgment of a debt to take it out of the statute, is to be left to the jury. This would be to take from the court a question of law, and give it to the jury. Here the court below said the acknowledgment was not sufficient evidence to go to the jury, for them to infer a promise to pay the debt. The evidence in the record was not sufficient to amount to a waiver of the statute. The plea of the statute puts in issue not only the new promise, but the existence of the original debt; and the existence of the original debt must be proved, otherwise the

the new promise will not be sufficient. It will be a *nudum pactum*. If there is proof that the old debt has been paid, then the new promise amounts to nothing. No chancellor or jury could, on the bill and answer offered in evidence in this case, find that the defendant owed the plaintiff one cent. There is no acknowledgment of a debt, so as to take the case out of the statute, independent of a promise, whereby a promise could be inferred. He referred to *Clementson vs. Williams*, 8 *Cranch*, 72. *Danforth vs. Culver*, 11 *Johns. Rep.* 146. *Sands vs. Gelson*, 15 *Johns. Rep.* 511. *Wetzell vs. Bussard*, 11 *Wheat.* 310. *Laurence vs. Hopkins*, 13 *Johns. Rep.* 288.

*Gwynn*, on the same side. What will restore the remedy when the action is once barred by the act of limitations? This point has not been decided by this court. It has been said that this judgment must be reversed, 1. That the act of limitations does not extinguish the debt, but bars the remedy. It is a presumption of payment if the debt is not sued for within three years. 2. That an unqualified acknowledgment of the debt will take the case out of the statute. But what is evidence of an acknowledgment is not to be left to the jury; it is for the court. There are only two cases where the question was left, as a matter of doubt, to the jury. One of those cases was overruled in *Bicknell vs. Keppel*, 4 *Bos. & Pull.* 20. *Coltman vs. Marsh*, 3 *Taunt.* 380. It is only in very doubtful cases where the subject is left to the jury. But where the acknowledgment is accompanied with a denial, it is not left to the jury. All the *English* cases go upon the ground that the debt was acknowledged to be existing, and no denial of it is made. In *Bryan vs. Horseman*, 4 *East*, 599, the fact of the acknowledgment would not have been sufficient; and if nothing further had been said, the case would have been barred. The act of limitations takes in other actions as well as *assumpsit*. In no case but in *assumpsit* can an action be brought which has been barred by the statute. All other actions are barred, and no acknowledgment, &c. can sustain the action. *Boydell vs. Drummond*, 2 *Campb.* 162. *Rowcroft vs, Lomas*, 4 *Maule & Selw.* 457. This action was brought in March 1823, and

the only evidence at the trial was conversations which took place after the action was brought between the defendant, and the counsel of the plaintiff. That evidence furnishes complete proof that the defendant always denied the debt to be due. To revive a debt barred by the statute, there must be a voluntary acknowledgment of its existence without any denial or condition. *Wetzell vs. Bussard*, 11 *Wheat.* 316, *(note.)* 1 *Com. Dig.* 338, *(new ed.)* The *English* decisions have gone so far, that if the debtor has acknowledged the debt to be due, but said he would not pay it, it was taken out of the statute. But not where the debtor denied the debt to be due, although he acknowledged that it had once existed. *Norris's Peake*, 423. *Hudson vs. Carey*, 11 *Serg. & Rawle*, 10, 13. 2 *Stark. Evid.* 895, *(note.)* *Fries vs. Boisselet*, 9 *Serg. & Rawle*, 131. *Beale vs. Rowland*, *Hard. Rep.* 301. The evidence in the record is, that within three years the defendant said he regretted, &c. These conversations were after the action was brought, and after the defendant had pleaded the act of limitations, and were had with the plaintiff's counsel. *Holme vs. Green*, 2 *Serg. & Low.* 480. *Beale vs. Nind*, 6 *Serg. & Low.* 517. *Barney vs. Smith*, 4 *Harr. & Johns.* 485, go entirely upon the acknowledgment which was made without any denial of the debt being due, or refusal to pay it. It must be with the assent of the defendant that he is made liable for a debt once barred by the statute.

*Taney*, in reply. The prior debt relied on was the promissory note upon which the action was brought; and whether it had been paid or not was a fact for the jury to decide. That the debt once existed, is proved positively. The evidence offered was read without objection. The *endorsement* on the bill filed in equity only, and the answer thereto, were read in evidence.

The act of limitations either goes to the right to recover, or it bars the remedy. If the contract is rescinded, then the party could never recover on it. He could only use it in a suit on a new promise. An act of bankruptcy operates to the extinguishment of the contract; and if a new promise is made, the party must sue upon the new promise. In the cases cited from the *New York* Reports, the suits were upon new promises.

The case of *Sands vs. Gelston*, 15 *Johns. Rep.* 519, was made analogous to the cases of bankruptcy. *Sturges vs. Crowninshield*, 4 *Wheat.* 207, is in opposition to the *New-York* decisions. *Norris's Peake*, 422, 423, 424, *(and notes.)* The only operation of the act of limitations is to create a presumption that the debt has been paid. 2 *Stark. Evid.* 891 to 897, *(and notes.)* *Clementson vs. Williams*, 8 *Cranch*, 73, 74. *Barney vs. Smith*, 4 *Harr. & Johns.* 485. The act of limitations does not extinguish the debt, but only creates a presumption of payment. This has been repeatedly decided by the courts in *England*, and in this state. If the statute ought to be expounded differently, yet having been otherwise expounded by a series of decisions for two centuries, it is a judicial exposition, and has become a part of the statute. This court cannot overrule such decisions, as it would be to legislate, and not to adjudicate. The burthen of proof is on the plaintiff to prove that the debt has not been paid. If it is assumed that the statute creates a presumption of payment, but does not extinguish the debt, then it is only necessary for the plaintiff to prove that the debt has not been paid. This will repel the presumption of payment; and it becomes a question of fact whether or not the presumption is repelled. If the defendant acknowledged that the debt was once due, it is not sufficient unless he acknowledged he had not paid it. In *Boydell vs. Drummond*, 2 *Campb.* 162. *Rowcroft vs. Lomas*, 4 *Maule & Selw.* 457, and *Clementson vs. Williams*, 8 *Cranch*, 72, the evidence was only that the debt once existed. Where the acknowledgment admits the debt was originally due, and had not been paid, it will remove the bar of the act of limitations. *Wetzell vs. Bussard*, 11 *Wheat.* 310, 313. Where a party refers to a mode of settlement, which is proved to be false, the statute is no bar. 2 *Stark. Evid.* 894, *(note.)* 895. Here the defendant alleged that the debt sued for had been discharged in a particular way, which has been disproved by the plaintiff's answer to the bill, which the defendant and his partner had filed against him, as given in evidence at the trial of this case. Why should this presumption of payment be distinguished from other presumptions? It is not a conclusive presumption, not to be repelled, but is to be left to the jury. Many of the cases

cited assume the principle that it was sufficient to be left to the jury whether or not payment had been made. Any evidence from which the jury might infer that payment had not been made, was admissible; and if the jury found that payment had not been made, then the statute was no bar. If it is assumed as the doctrine that the statute goes upon the presumption of payment, it must be dealt with like all other presumptions; and if so it is to be rebutted by evidence upon which the jury are to decide. It is not for the court to say whether an acknowledgment was or was not sufficient to rebut the presumption of payment. If it is a question for the court to decide, then there must be, *first*, proof of the debt; and *secondly*, proof of the acknowledgment of the defendant that the debt had not been paid. The question then is, was the proof sufficient to establish that the debt had not been paid? *Wetzell vs. Bussard*, 11 *Wheat.* 310. There is no evidence that the defendant paid the debt, but he said he did not consider himself indebted to the plaintiff, because the plaintiff had it in his power to save himself. This is a clear admission that the debt had not been paid. The qualification made by the defendant was evidence to rebut the presumption of payment. The answer to his bill in equity proves that the debt had not been paid. 2 *Stark. Evid.* 894, 895. *Poe vs. Conway's Adm'r.* 2 *Harr. & Johns.* 307.

BUCHANAN, Ch. J. delivered the opinion of the Court. The appellee rests his defence upon the act of limitations of this state, on the effect and operation of which we are called upon to decide; and we approach the subject not without hesitation, surrounded and obscured as it is, by a cloud of discordant adjudications. Perhaps there is not a *British* statute which has given birth to so many conflicting decisions, as the statute of the 21 *James* I, *ch.* 16, the statute of limitations of that country; and we are familiar with the expressions of regret, by the eminent men who have sat in the judicial tribunals there, that the letter of that statute was ever departed from; a regret for which sufficient cause is to be found in the incongruity presented by the numerous decisions on that branch of the law.

The statute of *James* was never held in *England* to extinguish the debt, but was always understood as operating upon

the remedy only. In *Heyling vs. Hastings*, 1 *Ld. Raymond*, 389, *Holt*, Chief Justice, said that "the statute of limitations was founded upon very good reason, because men should not unravel contracts so long after, upon a supposition, that if they were not paid, they would sue sooner; and acquittances being subject to be lost, a man might be sued for what he had paid before." In *Quantock vs. England*, 5 *Burr.* 2628, Lord *Mansfield* said, "it was settled that the statute of limitations did not destroy the debt, but only took away the remedy." In *Mountstephen vs. Brooke*, 5 *Serg. & Low.* 245, *Abbott*, Chief Justice, said, "the statute was passed to protect persons who were supposed to have paid the debt, but to have lost the evidences of such payment." Hence after a consultation with all the judges, but one, it was stated by Lord *Holt*, in *Heyling vs. Hastings*, 1 *Lord Raymond*, 421, to be their unanimous opinion, that a promise by the defendant, at any time within six years before the commencement of the action, to pay the debt, was sufficient to take the case out of the statute. But that a bare acknowledgment of the debt within that period was held to be evidence only of a promise, and therefore not of itself sufficient. This distinction prevailed for a long time, but was at length broken down, and ceased to be regarded.

In *Yea vs. Fouraker*, 2 *Burr.* 1099, it was ruled that an acknowledgment of the debt, even after the commencement of the action, took it out of the statute of limitations. In *Quantock vs. England*, a submission to a commission of bankruptcy by a debtor, after the debt had been of more than six years standing, was held to be a waiver of the benefit of the statute, and such an acknowledgment as took the case out of it; and Lord *Mansfield* said, that the slightest word of acknowledgment would do it. And in *Trueman vs. Fenton*, 2 *Cowp.* 548, he said, "the slightest acknowledgment has been held sufficient; as saying, prove your debt and I will pay you; I am ready to account, but nothing is due to you. And much slighter acknowledgments than these will take a debt out of the statute."

These cases have been followed by a series of decisions from that time to this, by which this principle at least is now fully settled, that an acknowledgment of the debt by the defendant, within six years before the bringing of the suit, is sufficient to

take the case out of the statute of limitations; and very slight evidence, indeed, of an acknowledgment, has sometimes been deemed sufficient. In *Leaper vs. Tatton*, 16 *East*, 420, Lord *Ellenborough* said, "as the limitation of the statute is only a presumption of payment, if his own acknowledgment that he has not paid be shown, it does away the statute." In *Sluby vs. Champlin*, 4 *Johns. Rep.* 461, *Yates*, Justice, who delivered the opinion of the court, said, "it is now generally received as law, that if a party acknowledges a debt to be unpaid, it is such a waiver of the protection of the statute as to repel the presumption of payment, being a recognition of the former liability." And in *Sturges vs. Crowninshield*, 4 *Wheat.* 207, Chief Justice *Marshall* said, "statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance."

Since the case of *Sluby vs. Champlin*, the distinction which formerly prevailed in *England* between a promise to pay, and an acknowledgment of the debt, has been revived in *New-York;* and now, both in that state, and in *Pennsylvania*, the latter is held to be evidence only, to be left to the jury, of a promise to pay. Proceeding upon that principle, it seems to be settled in those states, that though a slight acknowledgment of the debt, when standing alone, will be sufficient, yet that if the debtor qualifies his acknowledgment in such a manner as to show it is his determination not to pay, the statute will protect him; as where a man admits the debt to be due, but declares that he intends to insist on the benefit of the statute. (*Murry vs. Tilly*, cited with approbation in *Fries vs. Boisselet*, 9 *Sergt. & Rawle.* 131;) or admitting it to be due, declares that he will not pay it—as in *Fries vs. Boisselet*, where the proof was that the defendant on being arrested, said he owed the plaintiff the money, and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken those steps he would keep him out of it as long as he could; which was held not to be sufficient to take the case out of the statute. And the same principle is fully recognized in *Sands vs. Gelston*, 15 *Johns. Rep.* 511, and *Roosebelt vs. Mark*, 6 *Johns.*

*Ch. Rep.* 266. The only difference between the act of limitations in this state, and the statute of *James* is, that here the limitation is but three years; and in this state, the rule prevailing in *England*, that an acknowledgment of the debt by the defendant within the time prescribed for bringing the suit, is sufficient to take the case out of the statute, has been adopted. In *Barney vs. Smith*, 4 *Harr & Johns.* 485, the venerable man who then presided, Judge *Chase*, said "the act of limitations does not operate to extinguish the debt, but to bar the remedy. The act of limitations proceeds upon the principle, that from length of time a presumption is created, that the debt has been paid, and the debtor is deprived of his proof by the death of his witnesses, or the loss of receipts. It is the design of the act of limitations to protect and shield debtors in such a situation; and consistent with this principle and this view, the decisions have been made, that the acknowledgment or admission of the debt will take the case out of the act of limitations; because, if the money is still due and owing, the defendant has not suffered from the lapse of time, nor has any inconvenience resulted to him therefrom." And again, in another part of his opinion, he says, "the acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the act of limitations. It does not create a new *assumpsit*, but is a saving of the remedy on the original promise." We, therefore, are not called upon now for the first time to give a construction to that act; that task has been performed by others, at whose hands we have received it, with their interpretation of it, from which, if we were disposed to do so, we should not feel ourselves at liberty to depart.

Perhaps it would have been better, if instead of endeavouring to rescue particular cases out of its operation, the letter of the statute had been strictly adhered to; if the original debt had always been considered as extinguished, and the moral obligation, treated as a sufficient consideration for an express promise to pay, on which to found an action. But according to all the cases, (for in this at least they agree,) the debt is considered as not extinguished, and the defendant can only avail himself of the statute in *England*, and act of assembly here, by pleading it; which, if he omits to do, it is held to be a waiv-

er of its benefit, and the plaintiff may recover on the general issue, though the debt should appear by the declaration to be of longer standing than the limited period. This settled construction has produced all the difficulties and discrepancies complained of; but it is a construction which is not now to be shaken by us: nor on the other hand should its operation be extended further than it has already gone.

Taking the act of limitations, then, as we find it, operating upon the remedy only, and not as extinguishing the debt; and feeling the necessity for a more definite and certain understanding of the effect of the adopted construction, than can easily be collected from particular cases, we will endeavour, not to reconcile the various decisions that are to be found in the books on this subject, but to lay down some general rules for the practical application of the principles they establish; that the act does not extinguish the debt, but only bars the remedy, and that an acknowledgment by the defendant of the debt, or a promise to pay it within the time prescribed, is sufficient to revive the action.

*First*, then, the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only has the effect to restore the remedy; which is not only according to the common practice, but is directly and strongly asserted in *Barney vs. Smith.*

*Second.* It need not be absolute and unconditional, but a conditional promise is sufficient; and in such case, it is incumbent on the plaintiff to show at the trial, either a performance of the condition, or a readiness to perform it; as if the words be, prove your debt, and I will pay you, which is an express promise to pay, on condition that the debt is proved. *Heyling vs. Hastings*, 1 *Ld. Raymond*, 389. *Trueman vs. Fenton*, 2 *Cowper*, 548. *Davies vs. Smith*, 4 *Espinasse Rep.* 36 *Loweth vs. Fothergill*, 4 *Camp. Rep.* 185. *Bush vs. Barnard*, 8 *Johns. Rep.* 407. These cases furnish different examples of conditional promises to pay, each of which was held sufficient to take the case out of the statute.

*Third.* An acknowledgment, to take the case out of the act of limitations, must be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true,

would exempt the defendant from a moral obligation to pay. For the law will not raise an *assumpsit*, or imply a promise to pay, what in equity and good conscience a man is not bound to pay. As if the defendant admits the debt, but at the same time resists the payment of it by alleging that he has a set-off against it, and that the plaintiff owes him more money; which virtually amounts to a denial of his liability, and a refusal to pay any part of it, on grounds furnishing a sufficient moral excuse for not paying it. And indeed, taking the whole of the acknowledgment together, (which must always be done,) is in effect equivalent to a declaration that the debt is discharged. If it were otherwise, and the plaintiff was permitted to avail himself of the acknowledgment of the debt, and to reject the qualification, injustice would always be done where the set-off, claimed by the defendant, should be itself barred by the act, or he should be in want of testimony sufficient to support it. Or, if he admits the receipt of money, and that it has not been paid, but claims it as a gift; which, if true, would exempt him from any liability to pay. Or, if on being called upon, the party says he has paid the debt, and will furnish the receipt, but fails to do so, this will not be sufficient to charge him; but is the very case intended to be provided for by the act, the case of a man who is supposed to have lost his evidence of payment.

*Fourth.* An acknowledgment of the debt, with a naked refusal to pay, or a refusal accompanied with an excuse for not paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient.

*Fifth.* Any unqualified acknowledgment of a present subsisting debt, or acknowledgment, with no other excuse for not paying it than a reliance on the bar created by the act of limitations, is sufficient to take it out of the act. *Clarke vs. Bradshaw & Coghlan*, 3 *Esp. Rep.* 155. *Bryan vs. Horseman*, 4 *East*, 599. *Evans*, in the notes to his translation of *Pothier on Obligations*, suggests to those whose claims are barred by the statute, and who wish to obtain an acknowledgment of the subsistence of the debt, the utility of filing a bill of discovery, and adds, "if the subsistence of the debt is ad-

mitted, and without perjury it cannot be denied, it will not, if there is any consistency of decision, be of any avail to add a claim to the protection of the statute."

The act of limitations, according to the received construction, proceeds upon the supposition, that from length of time the debt is paid, and was only intended to protect a party where the presumption arising from lapse of time is, either, that the debt has been discharged, or never existed, and not to protect him from a debt acknowledged by himself to be still due and unpaid, with no other excuse for not paying it than the supposed bar created by the act. When, therefore, a party admits the debt to be due, but standing upon the act of limitations alone, in the same breath refuses to pay it, he admits a case, to which the act, according to its spirit and reason, does not apply, under the interpretation given to it, and his refusal cannot avail him. But the continuing existence of the debt continues and carries with it the implied *assumpsit* that the law raises, which is not rebutted by his refusal to pay. Hence the very common use in the books of the terms "takes the case out of the statute of limitations;" that is, that it is a case not embraced by the statute.

*Sixth.* The acknowledgment of the debt may be in whole or in part.

*Seventh.* It is sufficient if it be after the bringing of the suit. *Yea vs. Fouraker*, 2 *Burr.* 1099. Which could not regularly be if it stood upon the footing alone of evidence only of a new promise, the replication being *assumpsit infra tres annos* before the bringing of the suit, and confining the issue to a time within that period; so that an acknowledgment, made after the bringing of the suit, would not be within the issue. The issue, therefore, in such a case, must be sustained on the part of the plaintiff, on the idea of an implied promise, continuing and running with the old debt acknowledged to be still due.

*Eighth.* An admission that the sum claimed has not been paid, is not sufficient without some further admission, or other proof, that the debt once existed.

*Ninth.* The acknowledgment need not be made to the plaintiff himself, but may be made to any body else.

*Tenth.* What kind of promise or acknowledgment is sufficient to take a case out of the act of limitations, is for the court to decide; and the evidence offered to prove such promise or acknowledgment, is proper to be submitted to the jury, as in other cases, under the direction of the court.

It has been contended in this case, that where the defendant alleges the debt to have been discharged, and refers to a particular mode of discharge, the plaintiff may entitle himself to recover by disproving the mode of discharge referred to. We are aware that the same has been said elsewhere. In *Hellings vs. Shaw*, 2 *Serg. & Low.* 236, Chief Justice *Gibbs* said, "where the defendant has stated, not that the debt remained due, but that it was discharged by a particular means, to which he has with precision referred himself, and where he has designated the time and mode so strictly, that the court can say it is impossible it had been discharged in any other mode. There the court have said, if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely." But afterwards, in *Beale vs. Nind*, 6 *Serg. & Low.* 517, Justice *Bayley*, afser reciting the words of Chief Justice *Gibbs*, says, "I certainly am not aware of the cases to which my Lord Chief Justice *Gibbs* refers to support that proposition." Thus strongly questioning the soundness of the proposition, to which, (seeing the inroads that have already been made upon the statute, which we are not disposed to push any farther, and no such decision having been made by this court,) we are not prepared to yield our assent; but think that every acknowledgment of a debt, which is offered to take a case out of the act of limitations, must be taken all together; and that no evidence can be received to turn a denial of the existence of the debt into an acknowledgment of a subsisting liability, by proving that he was mistaken in supposing it to have been paid. Which would be to take a case out of the act of limitations by other proof than the acknowledgment of the party; for in such a case he manifestly not only does not intend to acknowledge a present subsisting debt, but in fact denies it, and there is nothing to carry, or on which the law can raise an implied *assumpsit*. The declarations of the defendant are the plaintiff's own proof,

and if he chooses to introduce them, he must be content to take them as they are, and cannot be permitted to disprove them by other evidence, in order to raise an implied promise, or to furnish evidence of a promise to pay a debt, the existence of which is denied. With these views of the subject we do not think, from the evidence set out in the record, that the plaintiff is entitled to recover. Whatever might have been the effect of the expressions of regret by the defendant, if they stood alone, "that the plaintiff had been excluded from the deed of trust, and had not been allowed to come in for his claim," the declarations, always accompanying them, "that he did not consider that he was indebted to the plaintiff, because he had it in his power to have saved himself with the securities received from *William Taylor*, and ought not, therefore, to have looked to him for the money," sufficiently show that it never was his intention to acknowledge the claim of the plaintiff as a subsisting debt due by him, but on the contrary, taken together, amounted to a denial of any existing liability on him to pay; and for a reason, which, if true, furnished a real objection, and sufficient excuse for not paying it. For, if the plaintiff had in his hands securities with which he should and might have covered the amount of his claim, but from negligence or misapplication of the funds did not do so, he should not now look to the defendant for it; nor can he be permitted by evidence of the insufficiency of those securities to convert the defendant's denial of his liability into an acknowledgment of a present subsisting debt.

JUDGMENT AFFIRMED.

## DRURY *vs.* CONNER.—June, 1827.

**Whoever enters upon the estate of an infant, is considered in equity as entering as his guardian; and after the infant comes of age, he may by bill in chancery recover the rents and profits. If a person so entering shall continue the possession after the infant comes of age, chancery will decree an account against him as guardian, and carry on such account after the infancy is determined.**

**One who never occupied an estate, nor derived any advantage from it, but merely rented it out, and collected, and paid over the rent as it came into his hands, as the friend and connexion of another, for whose use he**

received the rent, and to whom he was bound to pay it over as agent, is not responsible in equity, for mesne profits, to the owner of such estate. It is true, as a general position, that chancery will not entertain a bill, where there is a full and complete remedy at law, and no ground is shown for going into equity; and ordinarily a bill for mesne profits, after recovery in ejectment, showing no obstacle at law, and stating no ground of equitable relief, would on plea or demurrer, and perhaps at the final hearing without either, under the practice of this state, be dismissed, there being an adequate remedy at law.

APPEAL from the Court of Chancery. The bill, filed on the 14th of October 1819, by the appellee against the appellant, stated that *William Conner*, the father of the complainant, died intestate in the year 1799 or 1800, seized in fee of a tract of land lying in *Anne-Arundel* county, called *Holloway*, or *Oliver's Preservation*, containing 147 acres, which descended to the complainant, and his brother *Marmaduke*, and his sisters *Harriet*, *Nancy* and *Matilda*. That *Henry C. Drury*, the defendant, being then in possession of the said tract of land, and holding and claiming it under a certain *Frederick Mills*, one of whose daughters he married, and receiving the rents and profits thereof, the complainant, and the said *Marmaduke*, *Harriet*, *Nancy* and *Matilda*, on the 12th of January 1816, instituted an action of ejectment in *Anne-Arundel* county court against him for the recovery of the said land; and on the 27th of September 1819, recovered the same—each his or her undivided fifth part, by the judgment of the said court. That a writ of *habere facias possessionem* issued, and possession was had by the complainant, and the said *Marmaduke*, *Harriet*, *Nancy* and *Matilda*. The bill then charges, that the defendant had been in possession of the said land a long time previous to the institution of the said action of ejectment, and subsequently to the death of the complainant's father, and so remained in possession until the execution of the said writ of *habere facias possessionem*, during which time he received the rents and profits of the same, and cut down and sold a great quantity of wood and timber of various description, which was growing thereon, and received the purchase money therefor. The bill then states, that the complainant has not long attained the age of 21 years, to wit, within three years from the institution of the said action of ejectment, and from the filing of the present bill; and that during the whole period of the possession

of the defendant, the complainant was a minor, under the age of 21 years; and the defendant received the rents and profits of the said land as guardian of the complainant, though he had not been legally appointed. Prayer, that the defendant may be compelled to account, &c. and for general relief.

The answer of the defendant stated, that *William Conner*, deceased, the father of the complainant, and *Murmaduke*, &c. at the time of his death, possessed a legal estate in fee simple in the land mentioned in the bill; but that he never was in the actual possession thereof; that in his lifetime he sold all his interest therein to *Frederick Mills*, since deceased, for a full and valuable consideration, although no conveyance was ever executed for the same. That the said *Mills* left issue four children, viz. *Achsah*, *Ann*, *Elizabeth*, who is the wife of the defendant, and *Frederick*, and died in the peaceable and undisturbed possession of the premises, which vested in his said children. That from the 1st of January 1813, the defendant, by virtue of an assignment from the said *Achsah*, and in the right of his wife, was possessed of one moiety of the premises until he was dispossessed thereof as is stated in the bill. That it is not true that the defendant did cut down and sell wood and timber from off the said premises; but that he did receive the one-half of the rents and profits of the said premises for the space of six years, amounting in the whole to $600. That he considers himself entitled to the same by virtue of the said assignment from the said *Achsah*, and in the right of his wife *Elizabeth*. That he and his wife *Elizabeth*, and the other co-heirs of *Frederick Mills*, heretofore exhibited and filed their bill of complaint in the court of chancery against the complainant, and the other co-heirs of *William Conner*, deceased, to compel a specific performance of the said contract for the sale of the said premises so entered into as aforesaid by *Frederick Mills* and *William Conner*, in their respective lifetimes, and which bill of complaint is still depending in the said court. The defendant denies that he ever was in law or in fact the guardian of the complainant; and he denies the right of the complainant to compel him to account for the rents and profits of the said premises, or of any part thereof.

A commission issued by consent to take testimony, and tes-

timony was taken and returned thereunder. The material facts proved under it will appear from the opinion delivered by the Chief Judge of this Court.

JOHNSON, Chancellor, (July term, 1822,) *Decreed*, that the defendant account to and with the complainant of and concerning the matters charged in the bill; and that the account be stated from the evidence already taken under the commission, and that which may be taken before the auditor. The account to be taken, reserving all equity at the final hearing.

The auditor reported two accounts, the one on which the chancellor's decree was grounded—*Account B.* charged the defendant on the 1st of January 1819, "to rents and profits of one moiety of *Holloway*, or *Oliver's Preservation*, for 7 years from 1st of January 1812, viz. at $90, per annum, $630

1824. Dec. 6. To interest on $90, part thereof from the 1st of January 1813, 337 58

$967 58

| | | |
|---|---|---|
| By *Henry C. Drury*, (the defendant,) in right of his wife, and of *Achsah Mills*, for $\frac{1}{8}$ | 120 94 $\frac{11}{16}$ | |
| By ditto as assignee of *Matilda Conner* for $\frac{1}{5}$ of the balance, | 169 32 $\frac{9}{16}$ | |
| By *Wm. W. Conner*, (the complainant,) ditto, | 169 32 $\frac{9}{16}$ | |
| By *Marmaduke W. Conner*, ditto, | 169 32 $\frac{9}{16}$ | |
| By *John Franklin*, & *Harriet* his wife, ditto, | 169 32 $\frac{9}{16}$ | |
| By *Sabritt Trott*, & *Nancy* his wife, ditto, | 169 32 $\frac{9}{16}$ | |
| | | $967 58 |
| To amount due to the complainant, | | $169 33 |

To interest on $110 25, part thereof from the 6th of December 1824, until paid."

Each of the parties excepted to the auditor's accounts and report. And afterwards two exhibits were filed—one, the record of the recovery in ejectment brought by the complainant and others against the defendant, as referred to in the bill, and

the other, a decree of the court of appeals, on the appeal of *Drury, et al. vs. Conner, et al.* 6 *Harr. & Johns.* 288.

BLAND, Chancellor, (March term, 1825,) *Decreed*, that the defendant pay to the complainant the sum of $338 66, with interest on $220 50, part thereof, from the 6th of December 1824, until paid, with costs to be taxed by the register. From which decree the defendant appealed to this Court.

The cause was argued at the last June term, before BUCHANAN, Ch. J. and EARLE and ARCHER, J.

*Taney*, for the Appellant, contended, 1. That the complainant's remedy for mesne profits was at law. *Dormer vs. Fortescue*, 3 *Atk* 129. *Jesus College vs. Bloom*, *Ib.* 262. *Warren & Taylor vs. Fergusson & Robertson*, 4 *Harr. & Johns.* 46. *Loker vs. Rolle*, 3 *Ves.* 4, 7. *Cooper's Plead.* 124. Where relief may be obtained at law, the party cannot proceed in equity. There is no proof in the record that the complainant was an infant; and if he was an infant, he should have rents only from the time of filing his bill. *Pulteney vs. Warren*, 6 *Ves.* 93, 94. An infant, as such, could not bring a bill for mesne profits. But it will be said the bill was not demurred to. The answer denies the right of the complainant to an account for the rents and profits. Where the defendant might have demurred to the bill, he may avail himself of want of jurisdiction at the final hearing. *Barker vs. Dacie*, 6 *Ves.* 686. Consent of parties cannot give jurisdiction. If it appears by the bill that it is a subject of which the court has no jurisdiction, they will not assume it. It is not necessary for the defendant to deny that the court has jurisdiction. *Carter vs. United Insurance Company*, 1 *Johns. Ch. Rep.* 463.

2. The proper parties are not before the court. *Cooper's Plead.* 33. Equity will prevent a multiplicity of suits. *Dungey vs. Angove*, 2 *Ves. jr.* 304. The children of Mrs. *Mills* should be parties—there being proof in the record that part of the rents and profits had been paid to her.

3. The complainant has no right to recover more than a moiety of that part of the land rented. *Saunders vs. Lord Annesley*, 2 *Sch. & Lef.* 73, 93. *Dungey vs. Angove*, 2 *Ves. jr.* 304.

4. The decree of the chancellor is clearly wrong. He has decreed the whole rents and profits, deducting one-eighth, when he should have deducted one-fourth. From the evidence, the estimated value of the rents and profits is too high. The true rule, as to the value, is the sum received and paid. The means from which the witnesses could calculate the value must be looked to. Interest too has been charged at the end of each year upon the amount stated as the rents and profits. This is wrong. 1 *Fonbl.* 159. *(note.)* The value of the improvements ought to be set off against the inflamed amount of the profits.

*Brewer, jr.* for the Appellee. 1. The court of chancery will not, in some cases, give relief, where it can be obtained at law; yet it will give relief for mesne profits where infants are concerned. 1 *Madd. Ch.* 75. *Dormer vs. Fortescue*, 3 *Atk.* 130. Where any person enters upon the property of an infant, he is a guardian or bailiff for the infant. If he entered during the infancy, he may be called upon in equity to account after the infant's arrival to full age. Where there are not sufficient facts stated in a bill to give the court jurisdiction, the defendant must take advantage of it by demurrer. *North vs. Earl of Strafford*, 3 *P. Wms.* 149, 150. *Holder vs. Chambury*, *Ib.* 256. *Ludlow vs. Simond*, 2 *Caine's Cas.* 18, 19, 39, 40, 51, 52, 56. *Underhill vs. Van Cortlandt*, 2 *Johns. Ch. Rep.* 369. *Livingston vs. Livingston*, 4 *Johns. Ch. Rep.* 290. All the authorities opposed to the rule are stated in *Baker vs. Dacie*, 6 *Ves.* 686. The old rule is a good one; it was to prevent the protracting litigation. But this case is properly cognizable in chancery. At law the defendant could not be allowed for a discount of the one-fourth claimed by him. He would have been compelled to go into equity to obtain it. This shows the propriety of this suit.

2. Each of the lessors of the plaintiff at law, as he had a right to do, filed a separate bill in chancery. The defendant consented to account, and he cannot now object for the want of parties. The judgment at law was against the present defendant only, and he is alone to be made defendant in this action. *West vs. Hughes*, 1 *Harr. & Johns.* 578.

3. The defendant cannot say he did not receive the whole of the rents and profits. The judgment in ejectment makes him answerable, whether he received them or not; but he did receive them, and is therefore bound to pay over.

4. The rule adopted by the auditor in coming at the value of the rents and profits, is the universal one. The value is only to be proved by witnesses who know it, and who give their opinion as to their ideas of its worth, one year with another.

*Magruder*, on the same side. 1. The defendant should have demurred to the bill, or pleaded to the jurisdiction of the court. By answering he has consented to the jurisdiction, and it is now too late for him to take advantage of the want of jurisdiction. Before the case of *Baker vs. Dacie*, 6 *Ves.* 686, it was the practice to answer the discovery, and demur to the relief asked. Lord *Eldon* said, the defendant might demur to the whole bill, because relief was asked in the same bill, which went for a discovery also. In *Taylor & Warren vs. Fergusson & Robertson*, the point was not raised. In this case the bill was not merely for discovery, but it was also for relief; and it is no more a bill for discovery than any other bill. *Yallop vs. Holworthy*, 1 *Eq. Cas. Ab.* 280. *Newburg vs. Bickerstaffe*, 1 *Vern.* 295. *Northleigh vs. Luscombe*, *Ambl.* 612. *Mundy vs. Mundy*, 2 *Ves. jr.* 128. 1 *Fonbl.* 148, 149. 2 *Fonbl.* 237, (*and note.*) *Mitf.* 110. *Post vs. Kimberly*, 9 *Johns. Rep.* 470, 493, 501, 505. A person who has established his title to land may go into chancery for the rents and profits. If he proceeds at law, he cannot at the same time go into chancery. The court of chancery has concurrent jurisdiction with the courts of law in all such cases. The action at law for mesne profits is of modern invention, and does not take away the chancery jurisdiction. The answer of the defendant shows that this is a case proper for the court of chancery. If the bill had set forth facts stated in the answer, that would have given the complainant a right to go into chancery. *West vs. Jarrett*, 3 *Harr. & Johns.* 485.

2. The case of *Wendell vs. Van Rensselaer*, 1 *Johns. Ch. Rep.* 349, is an answer to the objection as to the proper par-

ties. The complainant comes to assert his own claim, and that of no other person. His claim is distinct from any other persons. If there are sundry wards, each may call on his guardian to account. The representatives of Mrs. *Mills* have no interest in this suit. The other persons are also claiming against this defendant in separate actions. The answer does not allege that the defendant paid over a portion of the rents to Mrs. *Mills*. The testimony of Mrs. *Mills* is not to be considered as a supplemental answer.

*Taney*, in reply. The general rule, that where a court of law can relieve, chancery cannot interfere, is subject to exceptions. The party must bring himself within the exception to enable him to go into chancery. There is no exception in favour of rents and profits. In a case of mere legal title chancery will never interfere in favour of rents and profits. A claim for rents and profits is not a matter of account. A landlord cannot go into chancery to demand an account of rents and profits, and demand payment. He must allege something beyond his legal title—that on account of difficulties he is prevented from a recovery at law. There are no difficulties alleged here, nor is it the case of landlord and tenant; but where there has been a recovery of possession of the land at law, and where mesne profits might also be recovered. There is a complete remedy at law—rents and profits are similar to mesne profits. If an infant claims equitable jurisdiction, he must claim while he is an infant, and cannot when of full age go into chancery. The rents and profits are given as an incident on deciding the question of right to the land, where the party has been kept out of possession by fraud, &c.

*Curia adv. vult.*

BUCHANAN, Ch. J. at this term, delivered the opinion of the court. There is a manifest error in the account stated by the auditor, on which the decree in this case is founded. *William W. Conner*, in his bill of complaint, seeks to recover one fifth of the rents and profits of the land recovered in the action of ejectment mentioned and referred to in the bill, by the five children and heirs at law of *William Conner*, of whom he is one; one undivided fourth part of which land, was

on the 23d of July 1824, since the recovery in ejectment, and pending this cause in chancery, adjudged by a decree of this court to the heirs of *Frederick Mills*.

The most, therefore, that *William W. Conner* could be entitled to on any principle, would be a fifth of the rents and profits of the remaining three-fourths of the land. Whereas, in the auditor's account, he is allowed at the rate of one-fifth of the rents and profits of seven-eighths of the whole land, deducting in favour of the heirs of *Frederick Mills* one-eighth only, instead of a fourth, which principle is inadvertently adopted in the decree. And although the difference produced in the amount is not very great, yet it is the duty of this court to correct it. We think, moreover, there is another error in the decree, involving a much larger amount. *Henry C. Drury*, in his answer, alleges, that he had possession of but a moiety of the land; and although some of the witnesses prove, that he rented out the other half, which standing alone, would have been sufficient to fix him with the rents and profits of the whole, subject to a deduction of one-fourth, by virtue of the decree of this court of the 23d of July 1824; yet the circumstances under which he acted in relation to the part rented out by him, are so explained by the other evidence in the cause, as to exonerate him from any charge, beyond the rents and profits of the moiety of the land occupied by himself. *Frederick Mills*, the father of the wife of *Henry C. Drury*, died in possession of the land, claiming an equitable title to the whole of it, and his widow, *Ann T. Mills*, continued in the undisturbed possession of it, until the fall of the year 1811, or 1812, when, as appears from her testimony, she gave up one half of the land to *Henry C. Drury* on account of the supposed equitable title of his wife, and of another of the heirs of *Frederick Mills*, whose interest he had purchased, and continued herself to receive the rent for the other half for the whole of the time covered by the decree, as guardian to one of the children of *Frederick Mills*, and on account of the infant daughter of his remaining child.

*Henry C. Drury*, therefore, never did receive the rents and profits for his own use, or occupy and enjoy the benefit of any other part of the land, than the half that was given up to him by *Ann T. Mills;* but seems to have acted as her agent only,

in renting out the other half, and receiving for and paying over to her the rent, as it became due and was received by him, which by law, as her agent, it was his duty to do; and this without compensation, and under the belief that the equitable title was in the heirs of *Frederick Mills*, who had at that time a bill depending in chancery against the heirs of *William Conner*, to compel a conveyance of the land. And to make him answerable now, for the rents and profits so received by *Ann T. Mills*, would be to make him pay for that which he never occupied, or derived any enjoyment, profit or advantage from; but merely rented out, and collected and paid over, the rent as it came into his hands, as the friend and connexion of another, for whose use he received, and to whom he was bound to pay it over. Under such circumstances we think he should not be made accountable to the heirs of *William Conner* for the rents and profits of that proportion of the land, which was retained by *Ann T. Mills*, and for which she received the rent; but of the moiety only, according to the proof taken in the cause, with interest, which, in the language of the witness, she gave up to him, and of which he took possession, subject to a deduction of one-fourth, on account of the decree of this court of the 23d of July 1824, for a conveyance by the heirs of *William Conner*, of that proportion of the land to the heirs of *Frederick Mills;* and that the decree of the chancellor, directing him to pay to *William W. Conner* a sum that is equal to one-fifth of seven-eighths of the rents and profits of the whole land, is erroneous and ought to be reversed. If *William W. Conner* wishes to obtain a proportion of the rents and profits of that moiety of the land, which *Ann T Mills* did not yield up to *Henry C. Drury*, he must look to another quarter.

The objection, taken in argument, to the jurisdiction of the court of chancery in this case, on the ground that the bill, upon the face of it, discloses a case, in which the party has a complete remedy at law, cannot, we think, be sustained. It is certainly true, as a general position, that chancery will not entertain a bill, where there is a full and complete remedy at law, and no ground is shown for going into equity. And ordinarily a bill for mesne profits, after a recovery in ejectment, showing no obstacle at law, and stating no ground of equitable re-

lief, would, on plea or demurrer, be dismissed, there being an adequate remedy at law; and perhaps at the final hearing without either plea or demurrer, under the practice of this state, which has not been very fully looked into.

But this is not the case of an adult coming into chancery for mesne profits accruing after he became of age, and showing no ground for equitable interference. Whoever enters upon the estate of an infant, is considered in equity as entering as guardian for such infant. *Bennett vs. Whitehead*, 2 *P. Wms.* 645. *Morgan vs. Morgan*, 1 *Atk.* 489. *Dormer vs. Fortescue*, 3 *Atk.* 130. 1 *Madd. Ch.* 74. And after the infant comes of age, he may, by bill in chancery, recover the rents and profits. *Bennett vs. Whitehead*, 2 *P. Wms.* 645. And if a person so entering shall continue the possession after the infant comes of age, chancery will decree an account against him as guardian, and carry on such account after the infancy is determined. *Morgan vs. Morgan*, 1 *Atk.* 489. 2 *Fonbl.* 236. And treating a person who shall enter upon the estate of an infant, and receive the rents and profits, as the guardian of such infant, as it seems chancery does, there is no reason why the infant, when he arrives at age, should not have a bill in chancery against him for an account of the profits which have so come into his hands as guardian, that would not apply to the common case of a ward, after he comes of age, going into chancery against his guardian, legally appointed, for an account. In this case the bill alleges that *Henry C. Drury* took possession of the estate of *William W. Conner*, during his minority; that he continued a minor during the whole period of the possession of *Drury*, and that *Drury* received the rents and profits as his guardian.

Upon the face of the bill, therefore, there is a case made out for the jurisdiction of a court of chancery; and the objection to the jurisdiction on the ground that the bill presents a case in which the party has a remedy at law, does not properly apply.

The bill, upon the face of it, disclosing matter sufficient to give jurisdiction to the court of chancery, it was not a case fit for a demurrer; and if in point of fact, *William W. Conner*, was not a minor at the time *Henry C. Drury* acquired

possession of the land, it ought to have been pleaded, and cannot now be taken advantage of.

Agreeably to the directions of the court an account was stated, charging the appellant on the 1st of January 1819, for the rents and profits of *Holloway*, or *Oliver's Preservation*, as by the auditor's *account B*, $630

On the 6th Decr. 1824 for interest on said rents and profits as per said account, 337 58

$967 58

Deducting *Henry C. Drury's* ⅓ part, 241 90

$725 68

Charging him with *William W. Conner's* 1-5 of balance, $145 14

With interest on 1-5 of ⅓ of $630 or $94 50 from the 6th of December 1824.

*Decreed*, that the decree of the court of chancery be reversed—*Decreed* also, that the appellant pay to the appellee the sum of $145 14, with interest on $94 50, part thereof, from the 6th of December 1824—*Decreed* also, that the appellant pay to the appellee his costs in the court of chancery, each party paying his own costs in this court.

DECREE REVERSED, &c.

RABORG *vs.* THE BANK OF COLUMBIA.—June, 1827.

W drew a promissory note, which did not bear date at any particular place, but was made negotiable at the plaintiffs' bank: it was in favour of C R & Son, or order, and by the defendant, in their name, specially endorsed to the plaintiffs, whose bank was at G Not being paid at maturity, on the day after the third day of grace, it was presented to an agent of W at the said bank, appointed for the purpose of attending to the payment or renewal of W's notes held by the plaintiffs for payment, which being refused, notice of its dishonour was put into the post office at G. directed to C R, (the defendant,) at B, where he lived. W, when the note became due, lived at P G. It appeared that it was the custom at G, to demand payment of notes on the fourth day after they became due.—*Held*, that the defendant was liable on his endorsement to the plaintiffs.

In an action on a promissory note drawn in favour of C & R and endorsed by R in their names, to P, the writ was against R *as surviving partner of* C, but the declaration was not. It was proved that C died before the

making of the note. Judgment was rendered against R without stating, as surviving partner. On appeal—Judgment affirmed.

Where the appellate court had reversed a judgment and awarded a *procedendo*, and it afterwards, during the same term, appeared that there was a material mistake in the record upon which they acted, they struck out the judgment, &c. and ordered a writ of diminution *(note.)*

APPEAL from *Baltimore* County Court. This was an action of *assumpsit*, in which the writ was sued out against *Christopher Raborg*, (the appellant,) as surviving partner of *Christopher Raborg*. The declaration contained *four counts*. The *first count* averred that *Jacob Wagner* on the 23d of January 1817, at *George-Town*, in the District of *Columbia*, made a promissory note, bearing date the day and year aforesaid, and thereby promised to pay *Christopher Raborg* and *Christopher Raborg*, junior, by the name of Messrs. *C. Raborg & Son*, or order, $1500, for value received, negotiable at the Bank of *Columbia;* that the payee endorsed the said note to the plaintiffs (the appellees.) The *second count* was like the first, except that it described the note as payable to the said *Christopher Raborg*, by the name of *Christopher Raborg* and *Son*, by which name and style the said *Christopher Raborg* then and there carried on business and trade as a merchant, &c. The *third count* was like the first, except that it described the note as payable to one *Christopher Raborg*, surviving partner of *Christopher Raborg*, by the name of *Christopher Raborg* and *Son*. The *first count* omitted to aver the presentation of the note for payment. The *second* and *third counts* averred it to have been presented for payment to *Wagner* on the 28th of March 1817. The *fourth count* was for money had and received by the defendant, to the use of the plaintiffs. The general issue was pleaded.

At the trial the plaintiffs offered in evidence the following promissory note, which was admitted to be drawn by *Jacob Wagner*, and endorsed by *Christopher Raborg*, the defendant, by the name of *Christopher Raborg & Son:*

"$1500. 23 Jan'y. 1817.

Sixty days after date, I promise to pay Messrs. *C. Raborg & Son*, or order, fifteen hundred dollars, for value rec'd, negotiable at the Bank of *Columbia*. *Jacob Wagner.*

Credit the drawer. *C. R. & Son.*"

(Endorsed.) "Pay the contents of the within note to the President, Directors and Company of the Bank of *Columbia*, or order, value received. *Christopher Raborg & Son.*"

The plaintiffs also offered evidence, that on the 28th day of March, in the year 1817, payment of the said note was demanded from *Daniel Kurtz*, at the banking-house of the plaintiffs in *George-Town*, in the District of *Columbia*, the teller of the Bank of *Columbia* aforesaid, and that the said *Jacob Wagner* resided at that time, and for some time before, in *Prince-George's* county, in the state of *Maryland*, and that said *Kurtz* was agent for said *Wagner*, in attending to the payment and renewal of the notes of said *Wagner*, held by said plaintiffs, or deposited with them for collection, and that upon the said demand the said note was not paid, and on the same day a letter was put into the post office at *George-Town*, by the agent of the plaintiffs, directed to said *Christopher Raborg*, at *Baltimore*, where he resided, informing him that the said note was not paid, and that he would be looked to for payment thereof. And also gave evidence, that it had been the custom of the plaintiffs ever since their incorporation, and of all the other banks and merchants in the District of *Columbia*, to demand payment of notes on the fourth day after they became due, and not on the third. And the plaintiffs offered no evidence to show a personal knowledge by the defendant of the usage aforesaid other than the uniformity and notoriety of the usage for the time aforesaid. The defendant proved that *Christopher Raborg*, senior, the father of the present defendant, died in the month of June, 1815, and before the making and delivery of the said promissory note on which this action is brought. The plaintiffs then moved the court to direct the jury, that if they believed the evidence so offered by the plaintiffs, they were entitled to recover. Which direction and opinion the Court, [*Dorsey*, Ch. J. and *Hanson* and *Ward*, A. J.] accordingly gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at June term 1825, before BUCHANAN, Ch. J. and EARLE, MARTIN, and STEPHEN, J.

*Mayer*, for the Appellant, contended, that the judgment ought to be reversed.

1. Because the judgment could, if at all, have been against the defendant, only as a surviving partner, agreeably to the writ.

2. Because the declaration does not aver the partnership of the *Christopher Raborgs*, or the survivorship of the defendant.

3. Because upon the form and terms of the prayer the court below were not authorised to direct the jury to find the verdict which they gave.

4. Because demand of payment of the note was not made in time, and of the proper person, or at the proper place.

On the *first* and *second* points, he referred to 1 *Chitty's Plead.* 294. *Cabell vs. Vaughan*, 1 *Saund.* 291, g. *(note.)* *Jell vs. Douglas*, 6 *Serg. & Lowb.* 451. He contended that the defects in the declaration were not cured by the act of 1809, *ch.* 153, *s.* 2.

On the *third* point, he contended, that as there was no proof of partnership, the direction of the court was too general; they should have given a special direction.

On the *fourth* point he contended, that the demand on the maker of the note was not made in time—of the proper person, and at the proper place. The demand was not in time, being made on the fourth day after the day of payment. In *Renner vs. Bank of Columbia*, 9 *Wheat.* 582, the decision went upon the ground that the party had knowledge of the custom in the District of *Columbia* to protest on the fourth day. The custom is not considered as a part of the consideration of the note, or forming any part of the contract. The days of grace are given under the usage as an indulgence in extending the time when the note becomes due. It is to rebut the evidence of negligence in presenting the note for payment. A custom like this is in derogation of the common law, and is to be construed strictly. The custom is to be proved, and it must be shown that the party had knowledge of, and was bound by it. In *Bank of Columbia vs. Magruder*, 6 *Harr. & Johns.* 172, this court decided, that if the party knew the custom, he was bound by it. Here the court below went upon the notoriety

of the custom. Both the maker and endorsers of the note resided out of the District of *Columbia*, and the custom did not bind them. The place where the note was drawn is not stated in the note. There was no privity between the maker and endorsers, and the plaintiffs, (the endorsees.) The law of this state is to govern as to the days of grace to be allowed. *Robinson vs. Bland*, 2 *Burr.* 1077. Although the note is expressed on its face to be negotiable at the *Bank of Columbia*, yet it is not to be implied that it is to be paid there. The contract is to be performed in this state where the maker and endorsers resided, and where the holders seek to obtain payment. *Mandeville vs. Union Bank of George Town*, 9 *Cranch*, 9. If the endorser is bound by the custom, yet the demand of payment was not made of the proper person. There was no proof of a personal demand of the maker; it was merely made of *Kurtz*, who is said to be his agent. Where a note is made payable at a particular place, it constitutes a part of the contract, on the ground that the parties agreed it should be paid there; yet the law is that the demand of payment must be made of the drawer personally. Where there is a legally constituted agent, a demand of him is considered different, as in *Philips vs. Astling*, 2 *Taunt.* 206, where the agent was the acceptor of the bill.

*G. H. Steuart*, for the Appellees. On the *first* and *second* points, he cited 1 *Chitty's Plead.* 37. *Eccleston vs. Clipsham*, 1 *Saund.* 154, *(note* 1.*)* *Slipper vs. Stidstone*, 1 *Esp. Rep.* 47. *Gow on Part.* 208, 209. *Goelet vs. M'Kinstry*, 1 *Johns. Cas.* 405. *Wood vs. Braddick*, 1 *Taunt.* 104. *Smith vs. Ludlow*, 6 *Johns. Rep.* 667. *Spalding vs. Mure*, 6 *T. R.* 363.

On the *fourth* point. In *Jackson vs. The Union Bank of Maryland*, 6 *Harr. & Johns.* 150, this court decided that the party dealing with a particular bank was bound to notice the custom prevailing in the place where the bank is established. So here the maker and endorsers of the note in question, transacting business with the Bank of *Columbia*, were bound to notice the custom prevailing at that bank. Here the note was made negotiable at the *Bank of Columbia*, and it was bound by all the consequences which flow from the custom of that

bank. Usage must be respected in transactions of this nature. *Halsey vs Brown*, 3 *Day's Rep.* 349. The non-residence of the drawer and endorser does not affect the case. *M'Gruder vs. Bank of Washington*, 9 *Wheat.* 598. In *The Bank of Columbia vs. Magruder*, 6 *Harr. & Johns.* 172, this court said, that knowledge of the custom must be known to the party, yet they did not say how that knowledge was made to apply. Here the note was made negotiable at the *Bank of Columbia*, showing that it was to come under the usage and custom adopted by that bank, and existing in the District of *Columbia*, in the collection of the notes when they became payable. The *lex loci* is to govern. Here, by the note, it is plain as to where it was to be paid. The contract was executed with reference to its performance in the District of *Columbia*. The demand was made on the agent indicated by the drawer himself. He could not take advantage of the demand not having been legally made, when he directed it should be made of his agent. *Philips vs. Astling*, 2 *Taunt.* 206.

*F. S. Key*, on the same side. The validity of the local customs in the District of *Columbia* has been established both in the supreme court of the *United States* and in this court. The usage is not contrary to the law of the land. Where this usage of four days of grace prevails, it is to be regarded and sanctioned in the same manner as the usage of three days of grace prevailing in other places. The three days of grace, it has been said, is a sort of indulgence. At common law, the note is due at the end of the time stipulated; but usage has given three days of grace; so that a note for 60 days is a note for 63 days. It is so settled in *Renner vs. Bank of Columbia*, 9 *Wheat.* 585. It is a contract to pay on the 63d day. If within the usage of the District of *Columbia*, it is then 64 days; and the endorser is not liable until the maker makes default, and that is at the end of the 64th day. Here the contract was made with a view to its performance where the four days of grace prevailed. The parties to a contract, no matter where they reside, may make the performance of it where they please. Where then did the parties look to its performance, when they made this contract? No matter where the note was endorsed,

it was to be performed where the place of business of the drawer was. Before the endorser is answerable the drawer must be put in default, and to put him in default, it must be the non-fulfilment of his contract according to the usage of the place where it was to be performed. The presumption is, that the endorser knew where payment was to be demanded. Every person who takes a note is presumed to know where payment of it is to be demanded. Here the payment was to be demanded in the District of *Columbia*, and if demandable there, it was payable there. The contract of the maker was to pay the note at the end of 64 days; and the contract of the endorser was, that if the maker did not then pay, he would. This too was accommodation note for the benefit of the maker. The endorsing of the note was a letter of credit. *Violett vs. Patton*, 5 *Cranch*, 150. The note was made negotiable at the *Bank of Columbia*, which shows the intention of the parties; and the note was discounted at that bank for the benefit of the maker. Every endorser is considered as a drawer; and the defendant is placed here as the drawer of the note, and to stand in his place. Where a note is to be discounted at a bank, it is different from an ordinary note, which is not discounted, but to be collected. *Yeaton vs. Bank of Alexandria*, 5 *Cranch*, 49. If the demand had been made to this note on the third day, it would be liable to be objected to. The drawer would say it was against the contract—that the note was not due. This objection the endorser would also make. To find out when a note was due, you must look to the place where it was negotiated. But it has been said by the appellant's counsel, that the usage was established only where the parties knew of the custom, and had knowledge of it. This was the case here. By drawing the note, and endorsing, the drawer and endorser are presumed to know the custom. The presumption of knowledge may be made from circumstances. In this case the facts justified the court in giving the direction prayed by the plaintiffs. It is stated in the evidence that the usage was *notorious*; being so, the court did right in their direction to the jury. By endorsing the note it brought notice of the usage to the knowledge of the endorser. As the note was made negotiable at the *Bank of Columbia*, it shows that the maker and endorser were an-

swerable for all the consequences, and they were bound to know of the usage, by having made and endorsed the note. *The Bank of Columbia vs. Okely*, 4 *Wheat.* 236, 243. Knowledge must be inferred from circumstances, and actual knowledge is not necessary to be proved. *Renner vs. Bank of Columbia*, 9 *Wheat.* 582. *Cutler vs. Powell*, 6 *T. R.* 320. *Noble vs. Kenneway*, 2 *Doug.* 511. *Vallance vs. Dewar*, 1 *Campb.* 503, 508, *(and note.)* *Halsey vs. Brown*, 3 *Day's Rep.* 346. *Smith vs. Wright*, 1 *Caine's Rep.* 43. *The Bank of Utica vs. Smith*, 18 *Johns. Rep.* 230. *Lewis vs. Burr*, 2 *Caine's Cases*, 196. *Turner vs. Mead*, 1 *Stra.* 416. 2 *Chitty's Plead.* 219. *Jackson vs. The Union Bank of Maryland*, 6 *Harr. & Johns.* 150. If the maker of a note appoint a place for demand, a demand there is sufficient to charge the endorser. *Woodbridge vs. Brigham*, 12 *Mass. Rep.* 403.

*Mayer*, in reply. The responsibility of an endorser is *stricti juris.* The three days of grace is stipulated by way of indulgence—a forbearance to demand or sue until three days have elapsed after the note is due. To insist on a countervailing usage, it must be shown that the party to be affected by it had a direct knowledge of the existence of such usage. The usage is not to be viewed as a change of the contract. The note, and the contract in pursuance thereof, was that the note was to be paid in this state, and not in the District of *Columbia*, as no place of payment was designated in the note—the residence of both the maker and endorser being in this state. *Young vs. Bryan*, 6 *Wheat.* 151. The note being negotiable at the *Bank of Columbia*, does not necessarily make it payable at that bank; or that it brought home to the endorser knowledge of the special custom of that bank, that demand of payment was not to be made until the fourth day after the note became due. The note was not payable at the bank, unless it had been so expressed.

*Curia adv. vult.*

At this term,

JUDGMENT AFFIRMED,*(a.)*

*(a)* See the following case of *The Bank of Columbia vs. Fitzhugh*, where the opinion of the court is given at length on the same question as that raised on the *fourth* point in this case.

There were two other appeals to this court from judgments rendered in *Baltimore* county court, in actions brought by the *Bank of Columbia* against *Raborg*, on other promissory notes, drawn and endorsed, and payment demanded of the maker on the fourth day after each note became due, as stated in the above cause, except that it appeared by the record in one of the cases, that the endorsement of one of the notes sued upon had not been filled up to the plaintiffs, but was left blank. The court *affirmed* one of the judgments; but that, wherein the endorsement of the note did not appear to be filled up, they, for that reason *reversed* the judgment, and awarded a *procedendo*. It was, however, suggested at an adjourned meeting of the court of the present term, by the counsel for the appellees, that the endorsement to the appellees of the promissory note alluded to, had been filled up before the trial, and that the clerk had omitted to state that fact in the transcript of the record sent to this court. A certificate to that effect having been produced, the court, on motion of the appellees' counsel, struck out the judgment of reversal and award of *procedendo*, and ordered a writ of diminution. The counsel for the appellant, then consented that the record in this court might be amended by filling up the blank endorsement of the note; which being done, the judgment was also *affirmed*.

## THE BANK OF COLUMBIA *vs.* FITZHUGH.—June 1827.

A drew a note dated at G, and there payable 60 days after date, in favour of B, or order, who endorsed it to the plaintiffs, by whom it was discounted. On the first day, after the third day of grace, payment was demanded of this note of A, who not paying it, notice of its dishonour was sent by post to B, who did not then, nor when he endorsed the note, reside at G. It appeared that it had been the universal practice of banks and merchants at G, for 20 years, to present negotiable notes due and unpaid to the drawer for payment, on the fourth day of grace; that such usage was of public notoriety, and that the demand and notice above mentioned were in conformity thereto—*Held*, that B's contract was to be considered as made in reference to this usage; that both he and the drawer looked to the place where the money was to be paid, and the contract performed, and must be presumed to have known this usage, and he was, therefore, liable as endorser.

A usage of universal prevalence becomes a part of the existing law, and is to be noticed *ex officio* by the courts of justice; but a particular usage has a circumscribed and limited application, and must be supported by proof. Where it is well established, it is as obligatory on the objects of its operation as the general law.

Usage enters into contracts, becomes a part of them, and must be regarded in their interpretation.

Special usages control and govern the general law repugnant to them.

APPEAL from *Washington* County Court. This was an action of *assumpsit* brought in the names of the *President, Direc-*

*tors and Company, of the Bank of Columbia*, (now appellants,) against the appellee, upon a promissory note drawn by *Samuel Fitzhugh* at *George Town*, in the District of *Columbia*, on the 31st of March 1818, for $2500, and payable, sixty days after date, to *William Fitzhugh*, junior, (the appellee,) or order, and by him endorsed to the plaintiffs. The declaration contained but one count on the said note, in which the plaintiffs aver, that at the end of the 60 days, to wit, on the 3d of June 1818, they presented the note to, and demanded payment of, the said *Samuel Fitzhugh*, &c. The general issue was pleaded.

At the trial the plaintiffs offered in evidence the following promissory note:

"Doll. 2500. *Geo. Town*, March 31, 1818.

Sixty days after date I promise to pay *William Fitzhugh*, junr. or order, twenty-five hundred dollars, value received, negotiable at the Bank of *Columbia*.

*Saml. Fitzhugh.*"

Endorsed: "Pay to *The President, Directors and Company, of the Bank of Columbia*.

*Wm. Fitzhugh*, junr."

The defendant admitted that the endorsement on the note was his proper handwriting. The plaintiffs proved, (under a commission,) that payment of the note was demanded of the maker on the 3d of June 1818, who did not pay it, and that a notice to the endorser was on the same day, after the demand and refusal aforesaid, put into the post office at *George Town*, directed to him at *Hager's Town*, *Maryland*, where he resided; and it was admitted that the defendant, at the time he endorsed the said note, and when it became due, and was protested, was not a citizen of *George Town*, or the District of *Columbia*, but was at the said times respectively, and still is, a citizen of this state, residing in *Washington* county. A variety of other testimony was taken under the commission which issued to the District of *Columbia*, which went to establish, that there had existed at *George Town* from the year 1793, to the date of the note, a practice among banking corporations, merchants, and dealers in negotiable paper, of demanding payment of unpaid notes and bills, on the fourth day after the time limited for pay-

ment, according to the terms of the note or bill had terminated, on which fourth day it was the practice to give notice to the endorsers, of the nonpayment thereof. That such practice was generally known, and almost universally prevailed among men of business at *George Town*; that persons who paid their notes on the fourth day of grace, maintained their credit as punctual men, though some punctual men paid their notes on the third day of grace; that about the 20th of June 1818, a different practice began to prevail, the validity of demanding payment from the maker of a note, on the fourth day of grace to bind the endorser, being then questioned; and some of the banks had payment of notes demanded, and notices to endorsers given, both on the third and fourth days of grace. That prior to that time no bank in *George-Town*, or in *Washington*, in the said district, where a similar practice had prevailed, was known to have a different practice, though there were some exceptions in practice from the banks in *Baltimore*, transmitting notes for collection, giving orders to have such notes protested on the third day of grace. The plaintiffs then prayed the opinion of the court, and their direction to the jury, that if they shall find from the evidence, that from the year 1798, up to the time when the note offered in evidence became due, it was the established usage and practice of the Bank of *Columbia*, and that it was the usage and practice of all the other banks in *Washington* county, in the District of *Columbia*, from the times they respectively went into operation, until and at the time the said note became due; and that it was the universal practice of merchants in the said county, to present negotiable notes, that were due and unpaid, to the drawer, for payment on the fourth day, *i. e.* the day after the third day of grace; and that such usage and practice was of public notoriety, and familiarly known to all merchants, traders, dealers and customers, in the said county; and, that the negotiable note offered in evidence was presented for payment to the drawer, and notice given to the defendant as endorser thereof, according to the said usage and practice, that then the plaintiffs were entitled to recover. Which opinion and direction, the Court [*Buchanan*, Ch. J. and *Shriver*, and *T. Buchanan*, A. J.] refused to give. The

plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued at the last June term, before EARLE, MARTIN, STEPHEN, and DORSEY, J.

*F. S. Key*, for the Appellants. This case is similar to that of *Raborg vs. The Bank of Columbia*, (*ante* 231,) and the arguments used there are applicable to this case. The decision of the Supreme Court of the *U. S.* in *Renner vs. Bank of Columbia*, 9 *Wheat.* 582, and *Mills vs. The Bank of the United States*, 11 *Wheat.* 431, and of this court in *The Bank of Columbia vs. Magruder*, 6 *Harr. & Johns.* 180, have established the lawfulness of the usage in the District of *Columbia*, of demanding payment of a promissory note on the fourth day after it falls due, in all cases coming within the sphere of its operation. So that the only question remaining is—Does the contract of the parties in this case come within the operation of that usage? It will be contended for the appellants that it does. The question, whether the usage is to prevail or not, is to be decided by ascertaining whether the parties looked to the performance of the contract *within the place* where the usage prevailed. For this see *Robinson vs Bland*, 2 *Burr.* 1078. *Ludlow vs Van Rensselear*, 1 *Johns. Rep.* 94. *Renner vs Bank of Columbia*, 9 *Wheat.* 588. *Chitty on Bills*, 273, 271, (ed. of 1817,) 337, 340, (ed. of 1821.) The endorsing a note is like the drawing of a bill by the endorser on the maker in favour of endorsee. *Chitty*, 336, (ed. of 1817.) And where a bill is drawn on a man in another place, the usage of *that place* is to prevail, and the drawer is bound by such usage. Still more as an accommodation note intended by the parties to be discounted *at a particular place*, which shows that the parties looked to a performance there. Still more when the note, as here expressed upon its face, that it is "negotiable at the *Bank of Columbia.*" *Yeaton vs Bank of Alexandria*, 5 *Cranch*, 49. *Mandeville vs Union Bank of George-Town*, 9 *Cranch*, 1. *Bank of Columbia vs Okely*, 4 *Wheat.* 243. Again, it will be contended that the note must have been dealt with according to the usage, or the maker could

not have been in default, and consequently the endorser could not have been held liable. And, therefore, the endorser's contract was—"Deal with this note so as to put the maker in default, and I will be liable." If this was not his contract, he made no contract to be liable in any way. As to the construction of such contracts, see *Chitty on Bills*, 118. Compliance with the usage was therefore a necessary part of the contract, and the defendant is presumed to know it. That this knowledge is presumed, and that no proof of actual knowledge is necessary, is shown by the following cases: *Cutter vs Powell*, 6 *T. R.* 320. *Yeaton vs Bank of Alexandria*, 5 *Cranch*, 49. *Noble vs Kennoway*, 2 *Doug.* 511. *The Bank of Utica vs Smith*, 18 *Johns. Rep.* 230. *Chitty*, (in *note*,) 352, 334. *Halsey vs Brown*, 3 *Day*, 346. *Robson vs Bennett*, 2 *Taunt.* 388. *Chitty*, 271, 273, (ed. of 1817.) 337, 340, (ed. of 1821.) *Jackson vs Union Bank of Maryland*, 6 *Harr. & Johns.* 146. *Vallance vs Dewar*, 1 *Campb.* 503, 508. *Allegre vs Maryland Insurance Company*, 6 *Harr. & Johns.* 408. In none of which cases was a knowledge of the usage by the party thought necessary to be proved. In the case of *Allegre vs Maryland Insurance Company*, this court decide that evidence of a usage prevailing in the insurance offices of *Baltimore* is admissible to explain the contract of a party, neither charged nor proved to have any knowledge of the usage. So that the only difference between this case and those of *Renner vs Bank of Columbia*, and the *Bank of Columbia vs Magruder*, is, that *there* was *actual knowledge admitted*, and *here* the same knowledge is *necessarily presumed.*

*Taney*, for the Appellee. The drawer of a note is answerable, whether there be a demand or not. The special custom is intended to operate against the endorser. The general rule is, that a note payable 60 days after its date, is due on the 63d day, and expounded as if so written. The usage assumed does not profess to give an interpretation of the note that it is payable on the 64th day. The usage proved is to demand on the *fourth* day, and to give notice to the endorser on that day. The proof in the cause is that punctual men paid their notes on the *third* day. The plaintiffs' prayer to the court below did

not go to the note, but only to the usage. The note is admitted to have become due on the third day; yet the usage is to demand payment and protest on the fourth. It was not put to the jury to say when the note became due. The whole effect of demand and notice is to make the endorser liable. Admit that this case is similar to that of *Mills vs Bank of the United States*, 11 *Wheat.* 431, yet this court is not bound by the decision in that case. Some decisions of the supreme court are binding upon this court; but that is not one of those cases. The laws of this state, passed before the grant of jurisdiction over the District of *Columbia*, to congress, govern in *Washington* county of that district, except where altered by congress. By that law the endorser of a note is not liable unless certain acts are done; one of which is, that demand of payment from the maker be made on the third day after the note becomes due. This is the general law of the commercial world. *Lennox vs Roberts*, 2 *Wheat.* 377. Every person is bound to know the general law; and in the absence of proof of a different law, brought home to him, he is not bound by it. The endorser undertakes conditionally. Although the note is made negotiable at the *Bank of Columbia*, yet it need not have been negotiated there. It might have been negotiated in this state; and if it had been discounted here, could it be subject to the usage in the District of *Columbia?* Would the endorser be bound differently if the note was discounted at the *Bank of Columbia*, than he would be, if discounted at any bank in this state? The legal exposition of the contract is matter of law to be decided by the court, and usage must be proved as part of the law. When a usage becomes general and universal, then it becomes a part of the law. It does not depend upon a usage being ancient or modern. No usage is to be noticed unless it becomes a part of the law; and it is to be judicially known when it becomes universal and general. By the law of this state the liability of the endorser is conditional. It is implied by law, that there must be demand of payment from the drawer on the last day of grace, and notice sent to the endorser by the mail on the next day. *Lenox vs Roberts*, 2 *Wheat.* 377. *Chitty on Bills*, 315. The custom in the District of *Columbia*, as assumed, is a custom affecting the endorser and not the drawer. The depositi-

ons of the witnesses state it to be variant. Some of the merchants paid their notes on the third day, and some on the fourth. By the general law the endorser is liable on the third day. Can a custom different from the general law bind an endorser without his consent? It is a custom differing from the law, and dispenses with the law for the benefit of the drawer, and not for the endorser. This note was negotiable at the *Bank of Columbia*, and it became liable to the short process of that bank, given under the act of 1793, *ch.* 30, *s.* 14; of this the endorser is presumed to have knowledge; but not of any new custom. That was the only object of the words "*negotiable at the Bank of Columbia*," inserted in the note. The usages mentioned in the cases cited by the appellants' counsel were not inconsistent with the rule of law. As to notice, &c. see *Chitty on Bills*, 277, 355, (ed. 1821.) The rule is, that the demand must be made during the hours of business. This is not a usage in opposition to law, but it is consistent with the law. The same rule is as to the fourth of July. The usage in *Jackson vs The Union Bank of Maryland*, 6 *Harr. & Johns.* 146, is consistent with law. It is a lawful usage. The decision in *The Bank of Columbia vs Magruder*, 6 *Harr. & Johns.* 180, went upon the principle of a waiver. There the endorser being in the District of *Columbia*, consented that the demand and notice should be on the fourth day. This would bind him independent of a custom; it being his contract in dealing with a bank accustomed to demand payment on the fourth day. Besides, he had knowledge of the usage; and his knowledge and conformity to the usage stands upon contract to be bound by the custom. Knowledge of the custom must be brought home to the endorser, and it then enters into the essence of the contract. If demand of payment is made on the third day, and notice by the mail on the fourth day to the endorser, the holder of the note might recover notwithstanding the custom. The usage does not abolish the law. By conforming to the law it will enable the party to recover in opposition to the custom. The usage cannot repeal a law. It is not the *lex loci* of the District of *Columbia;* but is a mere matter of contract between the banks, and their customers, in the district. The plaintiffs' prayer to the court below does not

put it to the jury, that the plaintiffs could not recover on the note on the third day if it was not then paid. If the principle contended for by the appellants' counsel is to prevail, every petty village in the state may have a custom of its own; and the doctrine upon promissory notes will no longer be fixed and settled.

*F. S. Key* in reply. It is not contended that the usage subverted the law; but that it enters into the contract, and forms a part of it. How did the three days of grace become a principle of law? By the usage entering into the contract. The person is presumed to have assented to the usage. All dealers in promissory notes are considered as merchants, and are brought within the usage, and are presumed to have consented to the three days of grace. In this case the only question is, whether the party knew of the usage, or was in a situation to know it? And it has been shown, it is believed, that he did know it, or was bound to know it. Suppose the note had been negotiated at any other bank, still it must be demanded of the drawer who resided in *George Town*, or whose agent resided there. It was the contract of the drawer, and it was to be dealt with as such.

*Curia adv. vult.*

EARLE, J. at this term, delivered the opinion of the court. This is a suit on a promissory note, brought in *Washington* county court by the appellants against the appellee, who endorsed the same. The note was given on the 31st of March 1818, by *Samuel Fitzhugh*, of the District of *Columbia*, to *William Fitzhugh* junr. of *Washington* county in this state, for $2500, payable to him, or his order, 60 days after date, and negotiable at the *Bank of Columbia;* and being endorsed to the bank, it was discounted for the accommodation and use of the maker. At the trial of the case the note was offered in evidence to the jury, the endorsement of *Wm. Fitzhugh* junr. on the same being admitted to be of the proper handwriting of the defendant. And it was proved by the plaintiffs, under a commission, that payment of the note was demanded of *Samuel Fitzhugh*, the drawer, on the third day of June 1818, being the day after the three days of grace, and the same was refused by him, and that notice of nonpayment was given to *Wil-*

*liam Fitzhugh* junr. by a letter deposited in the post office at *George Town*, directed to *Wm. Fitzhugh* junr. *Hager's Town*, *Maryland*, dated and deposited in the post office on the said third day of June 1818. The plaintiffs further proved under the commission, that it had been the constant and almost undeviating practice and usage of the *Bank of Columbia*, from its first establishment in 1793, until after this note became due, to demand payment on the day after the three days of grace, and to give notice of nonpayment to the endorsers on the same day; that a similar usage had prevailed for many years in all the banks in *Washington* and *George Town*; and that the same was of public notoriety, and universally and familiarly known to all merchants, and others, of *Washington* county, in the District of *Columbia*, where the said banks were established. And it being admitted that the defendant, at the time he endorsed the note, and also at the time the same became due, was not a citizen of *George Town*, in the District of *Columbia*, but that the said defendant was, at the times above mentioned, a citizen of this state, residing in *Washington* county, the plaintiffs, by their counsel, prayed the opinion and direction of the court to the jury, that if they should find, from the evidence in the cause, that from the year 1798 up to the time the note offered in evidence became due, it was the established practice and usage of the Bank of *Columbia*; and that it was the usage and practice of all the other banks in *Washington* county, in the district, from the time they respectively went into operation, until and at the time the said note became due; and that it was the universal practice of merchants in the said county to present negotiable notes that were due and unpaid, to the drawer for payment, on the fourth day, *i. e.* on the day after the third day of grace; and that such usage and practice was of public notoriety, and familiarly known to all merchants, traders, dealers and customers, in the said county; and that the negotiable note offered in evidence was presented for payment to the drawer, and notice given to the defendant, as endorser thereof, according to the said usage and practice, that then the plaintiffs were entitled to recover. The court refused this opinion and direction, and their refusal gave rise to the exception, the matter of which we are now to revise and consider.

This usage of the Bank of *Columbia* of demanding payment on the fourth day, has been recognized in this court on a former occasion, in the case of the *Bank of Columbia vs Magruder*, 6 *Harr. & Johns.* 172, as a reasonable and legal usage, the evidence of which should be received, to come at the understanding of parties in their contracts, which are made with reference to the usage. And it was determined, by that case, to be of the essence of the contract, and to constitute a part of it although not expressly incorporated in it, where it was personally known to the party. This decision was given upon the case submitted, which was most streneously urged on the ground of knowledge brought home to the defendant; and however strong its expressions are, it was not its object to touch any other subject than the one considered; and it was by no means its view to close the door against the question now raised, which we understand to be, whether, without actual knowledge, the usage is binding on the appellee who endorsed the note to the Bank of *Columbia?*

A usage of universal prevalence becomes a part of the existing law, and is to be noticed *ex officio* by the courts of justice; but a particular usage has a circumscribed and limited application, and must be supported by proof. Where it is well established, it is as obligatory on the objects of its operation as the general law. The usage under our notice is of this fixed and established character. It is of great notoriety, and long standing; is recommended by its uniform and unvaried operation; and has the sanction of the judicial tribunals of the country. For years back it has been made to bear on merchants and others dealing with the bank; and the first inquiry is, whether the appellee's acts have brought him within the sphere of its operation? And we are strongly inclined to think they have. The note, made negotiable at the bank, was endorsed by him for the accommodation of the maker, and he appears to us as much identified with the negotiation, and to have become as much a dealer at the bank, as if he had endorsed it for value received. His remote situation makes no difference, as the transaction brings him in contact with the institution, and he and the drawer have both to look to the district as the place where the money is to be paid, and the contract to be performed. If for the pur-

poses of this decision the appellee is to be viewed in the light of a dealer with the bank, the next and more important inquiry is, is he bound to take notice of the usage, and will the law presume his knowledge of it? The argument is, that he is placed in a situation to know, and is therefore presumed to know. There are usages analogous to this, which have been resorted to in the interpretation of contracts, where it will be found from the authorities, the party has been deemed to be bound without personal or special knowledge. Such, among others, is the case of *Noble vs Kennoway*, 2 *Doug.* 511, where the distinguished judge, who pronounced the opinion of the court on the construction to be given to a policy of insurance, is represented to say, "every underwriter is presumed to be acquainted with the practice of the trade he insures, and that, whether it is recently established or not. If he does not know it, he ought to inform himself; it is no matter if the usage has only been for a year."

The case of *Vallance vs Dewar*, 1 *Camp.* 503, is to the same effect. The action was upon a policy, and in giving it an interpretation, Lord *Ellenborough* adjudged, that a usage which was notorious must be presumed to be equally within the knowledge of both parties; and if a usage be general though not uniform, the underwriters are bound to take notice of it.

There was a case decided in the supreme court of *New York*, in the year 1820, which bears a yet closer analogy to the case we are considering, inasmuch as it relates to the demand of payment of promissory notes. It is the case of the *Bank of Utica vs Smith*, and is reported in 18 *Johns. Rep.* 230. The note was made payable at the *Mechanics' Bank* in the city of *New-York*, and payment was demanded within a quarter of an hour after 3 o'clock, P. M. which is the time for closing the bank as to ordinary business. This supposed irregularity was seized on, among others, to defeat the claim, and the defendant bottomed himself on the undeniable general position, that presentments for payment must be made at a bank, where it is the appointed place of payment, during the regular hours of business. To this was opposed the usage of the *Mechanics' Bank*, whose course of doing business was to allow 15 minutes after banking hours for the presentment and payment of notes. It

was contended by counsel, that the usage was not sufficiently shown, that it ought to be proved and brought home to the knowledge of the defendant; but it was notwithstanding decided by the court, that the bill was properly presented at the bank for payment, and although it was near a quarter of an hour after the usual time for closing the bank as to other business, it was yet within bank hours, the 15 minutes being the accustomed time for such presentments, and of the course of business at the bank, the defendant being the endorser, ought to have informed himself. His admitted residence was at *Peterborough, Madison* county, in the state of *New-York*.

But it was earnestly pressed upon us, on the argument, that the usage of the *Bank of Columbia* is entirely unlike the usages which were decided on in the cases above mentioned, because it is directly repugnant to the general law of the district. By that law, which is the law of this state, demand is made on the third day of grace, and not on the day after the third day. We have to confess we cannot perceive that this argument has much force in it. We have already determined, that the contract with the bank, is not made with a reference to the existing law, where the party has a personal acquaintance with the custom; and we think it will be no great stretch of the adjudication to say, that the contract is not made in reference to the general rule, where the particular rule is *presumed* to be in the knowledge of the party; if in the first case, so in the last, the usage enters into the contract, and becomes a part of it, and must be regarded in the interpretation of it. Direct authorities, however, are to be found, where the particular custom has been determined to prevail over the existing law, although in terms opposed and repugnant to it. The case of *Cutler vs Powell*, 6 *Term. Rep.* 320, is of this description. The suit was upon a promissory note given to the mate of a ship for a certain sum of money, provided he proceeded on his voyage, and continued to do duty to the port of destination. He died on the voyage, and agreeable to the principles of the common law, it was clear that nothing was due on the note, as he did not continue to do duty to the port of destination. An inquiry, nevertheless, into the usage in such cases, was directed to be made by the court, and all the judges expressed a willingness to sanction an allow-

ance for the time the service was performed, if the usage would warrant it.

A case still more to the purpose on this point was decided in the year 1809, in the supreme court of errors in the state of *Connecticut*, *Halsey vs Brown*, 3 *Day's Reports*, 346, where *assumpsit* was brought against the owners of a brig for certain gold and silver coins shipped on board, to be transported and delivered to a mercantile house in *New-London*, for which a bill of lading was given by the master in the usual form. On the trial of the general issue, the ship owners, to repel their liability, gave evidence of a usage or custom that the freight of money received by the master of a vessel was his perquisite; that he was to be compensated for the transportation of it, and not the owners of the vessel, and that the contract was considered as being personal, and of individual obligation, but not as the contract of the owners. This evidence was objected to, but suffered by the court to go to the jury, and the defendants obtained a verdict; on a motion for a new trial it was forcibly argued, that the law rendering the owners liable for goods received by the master to be transported, was the settled law of the state; that the contract of the master was the contract of the owners; his nondelivery was their nondelivery; and that the maxim *respondeant superiores* well applied.

The court stated the true question to be, whether evidence of a particular custom or usage could be given in evidence to control the general law; they admitted, that by the general law owners of vessels were answerable for the contracts of their masters; but they said it may be controlled by a special local usage, so far as that usage extended, which would operate on contracts made in view of or with reference to it; and they refused a new trial. It is believed many other cases might be produced where special usages have been decided to control and govern the general law repugnant to them; but the court are fully satisfied on the point, and deem it unnecessary to multiply references to authorities.

It is their opinion, that the defendant is placed in a situation to be acquainted with the above usage of the *Bank of Columbia*, and must be presumed to know it; and that his contract is to be considered to have been made in reference to the

usage, and not to the general law, which confines the demand of payment to the third day.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## SANDERSON's Ex'rs. *vs.* MARKS.—June, 1827.

A surety in a replevin bond is not a competent witness for the plaintiff in replevin.

The bill of sale of a sheriff for chattels levied on and sold by him, is improper testimony in itself, however it may be considered, accompanied by proof of the sheriff's authority to sell the property it professed to convey.

All the testimony offered by the plaintiff, who sued as executor, being rejected by the court as incompetent, and the defendant having given in evidence declarations of the testator, tending to prove the plaintiff's claim, it is a proper case for the jury to consider and decide, and the court have no right to instruct the jury that the plaintiff was not entitled to recover.

The declaration in replevin should not include any property not taken under the writ of replevin.

If a father, as natural guardian of his child, was in possession of a slave at the time of a gift of the slave by the owner to the child, it was such a possession as was required by the act of 1763, *ch.* 13, *s.* 3, to make it a valid gift, and passed the property without any further delivery by the donor.

APPEAL from *Saint-Mary's* County Court. This was an action of replevin for sundry goods and chattels, and a negro boy named *Jack*. The replevin bond was executed on the 23d of October 1821, by *Gerard N. Causin*, and others, to the defendant, (now appellee,) for prosecuting the writ of replevin in the name of the plaintiffs' testator. The defendant pleaded, 1. Property in himself, and 2. Property in one *Sophia Marks*. Issues were joined on the general replications to those pleas. The death of *Sanderson* was suggested, and the plaintiffs appeared as his executors, exhibiting letters testamentary to them granted, &c.

1. At the trial the plaintiffs offered to read in evidence a bill of sale from *John Stevenson*, sheriff of *Baltimore* county, to *Michael Sanderson*, (the plaintiffs' testator,) executed on the 12th of October 1819, for sundry goods and chattels, and a negro boy named *Jack*, stated to have been seized by *Stevenson* as the property of *William Marks*, under an execution issued

at the suit of *William Riley* against the lands, &c. of *Marks*, and by *Stevenson* sold at public auction to *Sanderson* for $512. The bill of sale appeared to have been acknowledged by *Stevenson* before a justice of the peace for *Baltimore* county, and recorded the same day among the records of that county. To the admissibility of which the defendant objected; and the Court, [*Key*, and *Plater*, A. J.] were of opinion that it was inadmissible, and refused to permit it to be read in evidence to the jury. To which opinion of the court the plaintiffs excepted.

2. The plaintiffs then read in evidence the following deposition, (admitted to be read so far as the same was competent testimony,) viz. "*G. N. Causin*, attorney for the plaintiffs, makes oath, that he believes the plaintiffs cannot proceed to the trial of the said cause with justice to themselves, at this term; that *John Stevenson* of *Baltimore* county, is a competent witness in said cause, and he has reasonable expectation that his attendance can be procured by the next term; that he believes the said witness will prove the plaintiffs' testator to have maintained through life a fair and upright character; that at times he, (the plaintiffs' testator,) was in the habit of vaunting of his benevolent actions; and that the boy *Jack*, mentioned in the declaration, is the same boy mentioned in the bill of sale filed in the cause from *John Stevenson*, sheriff of *Baltimore* county, to the plaintiffs' testator." The plaintiffs further gave evidence by *Gerard N. Causin*, that he heard the defendant, after the said negro, in the declaration mentioned, was taken by virtue of the replevin issued in this cause, say that it was strange that the plaintiffs' testator should replevy the said negro; for although he had bought the said negro, yet afterwards he had given him to his, the defendant's daughter *Sophia*. The defendant then gave in evidence the following deposition, taken by consent of the parties in this cause, and admitted to be read in evidence, so far as the same was competent, viz. "*Aquila Carroll*, of *Baltimore* county, deposeth and saith, that he well knew *Michael Sanderson*, in his lifetime, and has heard him say that he had set *Marks* on his legs, that they had taken all of his property even to a bed, and that they had taken it for house rent, or debts, but for which he cannot now recollect;

and that he had given all the property, and a negro boy which formerly belonged to *Marks*, the defendant, and which he had bought at a sale of *Marks'* property by the sheriff of *Baltimore*, to *Marks'* daughter *Sophy*, and that he gave them to his daughter to prevent his creditors from again taking them; and that this statement he had frequently heard him make." To interrogatories put to the witness by the defendant he answered, 1. That the above conversation took place shortly after the occurrence took place. 2. *Sanderson* said that the boy and property of *Marks*, seized and sold by the sheriff, was bought and paid for by him. 3. *Sanderson* said be had bought the property for the sake of *Marks'* family, but said nothing about the delivery. 4. *Sanderson* did not say he was in debt to *Marks*. 5. *Sanderson* had no family or any relations, to the knowledge of the witness—He believed he had relations in *Europe*. 6. He has known *Marks* for 15 or 20 years. 7. He cannot say that at the time of the conversation before mentioned with *Sanderson* the negro boy and property were in possession of *Marks*, and used by him then and afterwards. 8. He does not know how long *Marks* remained in *Baltimore* after the sale of the boy and property. He does not think it was many months. *Marks'* daughter was between the age of 15 and 20 years, and then was living with her father. 9. He does not know that a great intimacy existed between *Sanderson* and *Marks*. The defendant then offered in evidence the replevin bond filed in this case; and it was admitted that *Gerard N. Causin*, in the said bond mentioned, and the said *Gerard N. Causin*, who gave testimony as mentioned herein, was one and the same person. The defendant then prayed the court to instruct the jury, that the testimony of *Causin* was illegal and not to be regarded by them; of which opinion the court were, and so instructed the jury. To which the plaintiffs excepted.

3. The plaintiffs then prayed the court to instruct the jury, that if from the testimony they should be of opinion that the plaintiffs' testator purchased the said boy *Jack* at the sale of the defendant's property by *John Stevenson*, sheriff of *Baltimore* county, that then, to make a gift of said boy from *San-*

*derson* to *Sophia Marks* good and valid in law, the same must be accompanied by a delivery of possession, or established by a bill of sale from *Sanderson* to *Sophia Marks*, acknowledged and recorded agreeably to law. But the court refused to grant the said prayer; but instructed the jury, that if they should be of opinion that the said negro boy was in possession of the defendant, as natural guardian to his daughter, then it was such a possession as is required by the act of assembly. To which refusal and opinion of the court the plaintiffs excepted.

4. The defendant then prayed the court to instruct the jury, that from the preceding evidence the plaintiffs were not entitled to recover the said boy in the declaration mentioned. Of which opinion the court were, and so instructed the jury. The plaintiff excepted, and the whole of the preceding formed one bill of exceptions. *Verdict* as to the *first* issue, that the property in the said goods, &c. at, &c. was not in the plaintiffs; and the same verdict as to the *second* issue. Judgment was rendered thereon for the defendant; and the plaintiffs appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, J.

*Magruder*, for the Appellants, contended, 1. That the bill of sale from the sheriff of *Baltimore* county ought to have been read in evidence. 2. That the court erred in not instructing the jury that if they should be of opinion from the evidence, that the plaintiffs' testator purchased the boy *Jack*, for which this action was brought, then to make a gift of said boy from the testator to *Sophia Marks* good, there must be a delivery of the property, or a bill of sale recorded, according to law. 3. That the court erred in instructing the jury that the evidence did not entitle the plaintiffs to a verdict. He referred to the act of 1763, *ch.* 13, *s.* 3.

*C. Dorsey*, for the Appellee.

EARLE, J. delivered the opinion of the Court. The dispute between the parties in this case is about the right of property

in a negro boy named *Jack*. The replevin issued for sundry other chattels, but they were not replevied by the sheriff, nor noticed by him in his return of the writ. They nevertheless very inaccurately appear in the declaration; and their caption and detention being complained of, they are embraced in the pleas filed by the defendant, and in the issues tried in the cause; These pleas and issues are, that the property in these goods and chattels, and negro boy, is in the defendant and not in the plaintiffs; and that the property in the same goods and chattels, and negro boy, is in *Sophia Marks*, the daughter of the defendant, and not in the plaintiffs. On the trial of these issues, the court below signed a bill of exceptions, which comprises four several opinions delivered by them. Two on the inadmissibility of evidence, and two on the distinct prayers of the plaintiffs and defendant. In the two first, we entirely concur with the court.

*G. N. Causin*, having been a security in the replevin bond, was certainly an incompetent witness to testify for the plaintiffs; and the bill of sale signed by the sheriff, *Stevenson*, was unquestionably improper testimony in itself, however it might have been considered, if it had been accompanied by proof of the sheriff's authority to sell the property it professed to convey.

The prayer on the part of the plaintiffs, the court refused to grant; but they expressed an opinion thereon, in which we coincide. They, in substance, instructed the jury, that if they should be of opinion the defendant, as natural guardian of his daughter, was in possession of the negro boy at the time of the gift, then it was such a possession as was required by the act of assembly to make it a good or valid gift, and passed the property to her without any further delivery by the donor.

The prayer on the part of the defendant, was answered by an instruction to the jury, "that from the preceding testimony the plaintiffs were not entitled to recover the negro boy in the declaration mentioned." All the evidence on the part of the plaintiffs had been rejected by the court, and the words *preceding evidence* can apply only to the testimony introduced into the cause by the defendant himself. This is to be found in the deposition of *Aquilla Carroll*, who deposed that he had heard *Sanderson* say, he had set *Marks* on his legs; that they

had taken all his property, even to a bed, and that they had taken it for house rent or debt, but for which, the witness could not at that time recollect; and that he had given all the property, and a negro boy, which formerly belonged to *Marks*, the defendant, and which he bought at a sale of the said *Marks's* property by the sheriff of *Baltimore*, to the said *Marks's* daughter *Sophy*, and that he gave them to the daughter to prevent his creditors from again taking them; and that this statement he had frequently heard him make. To further interrogatories on the part of the defendant, *Aquila Carroll* answered, that the conversation with *Sanderson* alluded to, took place soon after the occurrence; that *Sanderson* said the boy and property of *Marks*, seized and sold by the sheriff, were bought and paid for by him; that he bought the property for the sake of *Marks's* family, but said nothing about the delivery, and he did not say he was in debt to *Marks*. *Aquila Carroll* also answered to the defendant's interrogatories, that he had known *Marks* for fifteen or twenty years, but he could not say that at the time of the conversation alluded to, the boy and property were in the possession of *Marks*, or used by him then or afterwards; that *Marks* did not remain in *Baltimore* many months after the sale; that he did not know the year or month of the sale, and that *Marks's* daughter was then about fifteen or twenty years of age, and was living with her father; and that he had no knowledge of a great intimacy existing between *Sanderson* and *Marks*.

This testimony being before the jury, we cannot think the court were right in giving the instruction they did. Upon the facts of the purchase from the sheriff, and the gift to the daughter, depends the question, whether the plaintiffs have a right to recover the negro boy in dispute; and the proof offered of them is not of a character, it would appear, to be decided on by the court. The declarations of *Sanderson*, in reference to these points, become evidence in the cause, by the defendant's introducing and using them against his executors, and they ought to have been suffered to be considered, estimated and decided on by the jury; especially as the court had before submitted to their reflections, the question respecting the possession of the boy at the time of the gift.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## MURPHEY *vs.* BARRON.—June, 1827.

The action for money had and received, is an equitable action, and equally as remedial in its effects as a bill in equity.

If one man takes another's money to do a thing, and he refuses to do it, it is a fraud; and it is at the *election* of the party injured, either to affirm the agreement, by bringing an action for the nonpayment of it; or to disaffirm it *ab initio*, by reason of the fraud, and bring an action for money had and received to his use.

But where a vendor was exonerated from the delivery of a slave, then out of his possession, whom he had sold, and been paid for, and afterwards persuaded or enticed to abscond, so that the purchaser never got possession of him, no action can be maintained upon the contract of sale for a nondelivery, or to recover back the purchase money, as money had and received by him to the use of the vendee; either could have been maintained, if it had been the vendor's duty to deliver the slave; and he had refused. The proper remedy here is a special action on the case for persuading or enticing the slave to abscond.

APPEAL from *Harford* County Court. This was an action of *assumpsit*. The declaration contained *three* counts. The *first* count stated that the plaintiff, (now appellee,) being the owner of a negro man slave named *Isaac*, sold, conveyed and delivered, the said slave to the defendant, (the appellant,) to be holden in mortgage as a pledge and security for the payment of the sum of $404 61, due from the plaintiff to the defendant, and the defendant did then agree, assume and promise, that he would return and deliver the said negro to the plaintiff, on payment of the said sum of money; and although the money was afterwards paid by the plaintiff to the defendant in discharge of the pledge of the said slave, yet the defendant neglected and refused to deliver the said slave, &c. The *second* count was for money had and received. The *third* count stated that the defendant, being the owner and possessor of another slave called *Isaac*, did agree and contract with the plaintiff, that if he would pay to the defendant the sum of $404 61, as the purchase money and consideration therefor, the defendant would sell and deliver the said slave to him the plaintiff; and the plaintiff confiding, &c. paid the said sum of money to the defendant, which the defendant accepted as and for the price of the said slave; yet the defendant, not regarding his promise, &c. neglected and refused to deliver the said slave to the defendant, although, &c. The defendant pleaded *non assumpsit*, and issue was joined.

At the trial, the plaintiff produced one *Aquila Keen*,, one of the subscribing witnesses to the bill of sale first herein after set forth, who proved that he was requested, by the plaintiff and defendant, to witness the execution of the bill of sale; which he did; that when the plaintiff had signed the same, he requested the defendant to relate to the witness the understanding between them, respecting the negro *Isaac*, named in the bill of sale. In answer thereto, the defendant replied, that the understanding was that the plaintiff was to have the said negro again, provided he paid the defendant the money mentioned in the bill of sale, within four months, if he wanted the said negro for his own use. The same witness also gave evidence, that when the plaintiff and defendant came out of the house, shortly after executing the bill of sale, the plaintiff, seeing the said negro, observed to the defendant, that it was a lucky thing that *Isaac* was there, that he might take him, as he was his property, or words to that effect. The bill of sale, which was also read in evidence, was dated the 10th of April 1818, whereby, in consideration of the sum of $404 61, *Barron* bargained, sold and delivered to *Murphey*, his negro man *Isaac*. The negro therein mentioned was in pursuance thereof delivered to the defendant. The plaintiff also gave in evidence, that he did, on the 7th of July next, after the execution of the said bill of sale, call on the defendant and pay him the consideration money mentioned therein; and that the defendant did execute and deliver to the plaintiff a receipt for the money so paid; that at the time of the payment of the money, the plaintiff demanded of the defendant that he should deliver up the bill of sale; to which the defendant objected, but stated that he would agree to whatever a certain *Walter T. Hall*, a magistrate in the vicinity, should say he ought to do in this respect. That the plaintiff then brought a letter from *Walter T. Hall* to the defendant, in which he did advise the defendant to give up the bill of sale, which the defendant did accordingly deliver up to the plaintiff; and also proved by *Walter T. Hall* the acknowledgment of the defendant that he had received from the plaintiff the full amount of the consideration money mentioned in the said bill of sale; that when the plaintiff called upon the said witness to get the said letter to the defendant, he showed to

the witness the receipt which he had obtained from the defendant; and that the said receipt contained no clause or condition whatever, but was merely a receipt for so much money for the said negro *Isaac*. And by another witness proved, that on the said seventh day of July, the plaintiff, after he had so paid the money to the defendant, went to take possession of the said negro, who had, previously thereto, been hired, by the defendant, to a certain *Charles G. Hall*, but when he went into the harvest field, where the labourers of the said *C. G. Hall* were at work, he found that the said negro had absconded, about an hour before his arrival, and left his cradle in the harvest field; and that he never gained possession of said negro, who since then, has not been found. And further produced a certain *Thomas H Griffith*, who proved that the defendant did, on the eighth day of July, in the same year, declare and say, that as he had understood that the plaintiff intended selling said negro out of the state, he should not gain possession of him; and that the defendant did direct one of his female slaves to go and give information to the said negro *Isaac* of the intention of the plaintiff to dispose of him out of the state; but that he did not see the said female slave obey the said order, and did not know that the information was conveyed to the said negro *Isaac* by her, then, or at any other time; or whether the same was conveyed to the said *Isaac* either by the defendant or by his orders. The defendant then produced one *John Murphey*, junior, a son of the defendant, also a subscribing witness to the said bill of sale, who proved, that on the same day of the execution of the said bill of sale, and delivery aforesaid of said negro, shortly thereafter, the plaintiff complained to the defendant that the sum which he had received for the said negro was less than he was worth. Whereupon the defendant promised the plaintiff, that if he wanted the said negro for his own use, and would not sell him out of the state, if he would, at any time within four months from the execution of the said bill of sale, pay and satisfy him the amount of the consideration money, stated in the said bill of sale, he would relinquish to the plaintiff all the right of said negro so as aforesaid conveyed to him; and that on the said seventh day of July, at the time when the consideration money aforesaid was paid to the

plaintiff, he did declare and say to the defendant that he did exonerate him from the delivery of the said negro; that he knew where he was hired; that he would take him where he was, and as he was. That on the morning of the 8th of July 1818, the plaintiff called on the defendant, and stated to him that he had lost or mislaid the receipt for the money paid by him, on the day before, and requested another; to which the defendant assented, taking first the following acknowledgment: "I hereby acknowledge I have lost or mislaid the receipt *John Murphey* gave me yesterday, for four hundred and ten dollars and sixty-seven cents, which is void if found.

*Ellis Barron.*

July 8th, 1818."

And then gave the following his second receipt: "Received July 8th, 1818, of *Ellis Barron*, four hundred and ten dollars and sixty-seven cents; it will be in full for negro *Isaac*, in case he is not conveyed out of the state of *Maryland* before the eighth of July, in the year of our Lord one thousand eight hundred and nineteen.

*John Murphey.*"

And also proved, by the said *John Murphey*, junior, that the following was brought some days afterwards to the defendant, by the plaintiff, and delivered by him: "Received, July 7th, 1818, of Mr. *Ellis Barron*, four hundred and ten dollars and sixty-seven cents, in full for all my right, claim and interest, of negro *Isaac*, which I purchased of him in April last, provided the said *Barron* does not sell, or cause to be sold, negro *Isaac*, out of the state of *Maryland*, for one year from this date.

*John Murphey.*

Test.—*John Murphey*, Junr."

And proved, by the said witness, that the aforegoing receipts were the original receipts which were given by the defendant to the plaintiff. And also proved by the same witness the execution and delivery, by the plaintiff to the defendant, of the following bond or instrument of writing: "Know all men by these presents, that I, *Ellis Barron*, of *Harford* county, and state of *Maryland*, am held and firmly bound by these presents, unto *John Murphey*, of the county and state aforesaid,

in the just and full sum of two hundred and fifty dollars, in case I the said *Ellis Barron* shall sell or cause to be sold negro *Isaac*, formerly the property of *John Forwood*, deceased, or exported out of the state of *Maryland* for one year, against his will, from this date. As witness my hand and seal this eighth day of July, in the year of our Lord one thousand eight hundred and eighteen.

*E. Barron*, (Seal.)

Test.—*John Murphey*, Junr".

The defendant also proved by the same witness, that on the said eighth of July, after the plaintiff had made an unsuccessful effort to gain possession of the said negro *Isaac*, he went to the defendant's house, and announced to him that the said negro had run away. To which the defendant replied he had taken away his cradle, and he supposed he should lose it; and that the plaintiff stated, that if he had taken away his cradle, the defendant should lose nothing by it, but that he would pay him for it. And proved, by *Charles G. Hall*, that about a year afterwards the plaintiff called upon the said *Charles G. Hall*, and stated that as the negro was his, he must pay to him his harvest wages. The defendant then prayed the following directions of the court to the jury. 1st. That if the jury believe that the plaintiff, on the payment of the money to the defendant in July, exonerated the defendant from the delivery of the negro slave aforesaid, and agreed to take him wherever he was, the plaintiff is not entitled to recover for the nondelivery of the said negro; and 2ndly. That if they should further believe that the defendant induced, enticed and persuaded the said negro to run away, still the plaintiff is not entitled to recover on the count for money had and received, nor on either of the special counts in the declaration. The *first* prayer the Court, [*Hanson*, and *Ward*, A. J.] granted; and did then and there direct the jury accordingly; but the *second* prayer above mentioned the court refused to grant. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued at December term 1825, before BUCHANAN, Ch. J. and MARTIN, and STEPHEN, J.

*Mitchell*, for the Appellant, contended, 1. That the second direction prayed ought to have been given by the court below; and that the declaration ought to have contained a special count for enticing away the plaintiff's slave. 2. That the promise and undertaking laid in the *first* and *third* counts were void in law for want of consideration and mutuality, &c. 3. That material substantial averments were wanting in all the counts in the declaration; and the court below ought to have given judgment against the plaintiff below. He referred to *Cortelyou vs Lansing*, 2 *Caine's Cases*, 205. *Jones on Bailment*, 86, and *Appendix* xvi. *Bank of England vs Glover*, 2 *Ld. Raym.* 753. As to the misjoinder of causes of action, he cited 1 *Chitty's Plead.* 199. *Coryton vs Lythebe*, 2 *Saund.* 117, *(note.)*

On the bill of exceptions, he referred to *Bird vs Randall*, 1 *W. Blk.* 373. 1 *Bac. Ab.* tit. *Actions on the Case*, (F) 87. He contended that no one of the counts in the declaration was sustained by the proof; and that parol evidence was not admissible to explain a written contract.

*R. Johnson*, for the Appellee. As there was a general verdict, any defective count in the declaration is cured by the act of 1809, *ch.* 153. Here the *first* is a good count. This is not an action for a tort. It is upon a contract. Trover might have been brought, but the plaintiff may waive the tort, and go upon the promise and undertaking. He may recover upon the *second* count, there being a breach at the end of the declaration. If there is a defect at all, it is merely formal, which this court will not regard. 1 *Chitty's Plead.* 98, 99.

*Mitchell*, in reply, referred to *Raborg vs Kirwan*, 1 *Harr. & Johns.* 296.

*Curia adv. vult.*

STEPHEN, J. at this term, delivered the opinion of the Court. On the 10th of April 1818, the appellee sold to the appellant, a negro man named *Isaac*, for the consideration of $404 61, and gave him an absolute bill of sale of the said negro; but immediately after the execution of the bill of sale, *Barron*, the appellee, requested *Murphy*, the vendee and appellant, to state

to one of the witnesses to the bill of sale the understanding between them respecting the negro, *Isaac*, when the defendant, *Murphey*, said the understanding between them was, that the plaintiff, *Barron*, was to have the said negro again, provided he paid the defendant, *Murphey*, the money mentioned in the bill of sale within four months, if he wanted the said negro for his own use. The plaintiff, to support his action, gave in evidence to the jury, that on the seventh of July, next after the execution of the said bill of sale, he called on the defendant and paid him the consideration money mentioned in the said bill of sale, and that the defendant did execute and deliver to him a receipt for the money so paid, stating it to be in full for said negro *Isaac*, if not sold out of the state within one year from that time. The plaintiff also gave in evidence to the jury, that on the day he paid the money to the defendant, he went to take possession of the said negro, who had previously thereto been hired by the defendant to a certain *Charles G. Hall*, but that when he went into the harvest field, where the labourers of the said *Hall* were at work, he found that the said negro had absconded about an hour before his arrival, and that he never gained possession of the said negro, who since then has not been found. The plaintiff further proved to the jury, that the defendant did, on the eighth day of July, in the same year, declare that as he had understood the plaintiff intended selling the said negro out of the state, he should not gain possession of him, and that the defendant did direct one of his female slaves to go to and inform the said *Isaac* that the plaintiff intended to sell him out of the state; but did not prove that the information was communicated to the said *Isaac* by the said slave, as directed by the defendant. The defendant, to support the issue on his part, proved to the jury, that on the seventh day of July, when the consideration money was paid by the plaintiff to the defendant, he did declare and say to the defendant, that he did exonerate him from the delivery of the said negro, that he knew where he was hired, and that he would take him where he was, and as he was. Whereupon the defendant prayed the opinion of the court, and their direction to the jury, that if they should believe that the defendant induced, enticed and persuaded, the said negro to run away, still the plaintiff was not entitled to

recover on his count for money had and received, nor on either of the special counts in the declaration; which opinion and direction the court refused to give; to which refusal the defendant excepted. And the question now to be decided by this court is, whether the court below did right in refusing to instruct the jury as prayed; or in other words, whether, upon the facts above stated, the action for money had and received can be sustained? The action for money had and received is an equitable action, and equally as remedial in its effects, as a bill in equity. *Evans*, in his Essay on the action for money had and received, 23, states the principle to be, that a suit in equity must be considered as being merely equivalent to an action for money had and received; and one of the grounds upon which this action can be supported, is where money has been paid upon a consideration which has failed. It was contended, in the course of the argument before this court, that upon the payment of the purchase money by the plaintiff to the defendant, the property revested in the plaintiff, and that the action should have been trover. In answer to that argument it may be remarked, that by the agreement of the parties, the defendant was expressly absolved by the plaintiff from any obligation to deliver the negro *Isaac* to him, he having expressly agreed to take possession of him where he was hired. But it is not necessary to decide whether or not this is a case where the action of trover might be supported; for if the action of *assumpsit* for money had and received is sustainable, there is no error in the opinion of the court below, and their judgment ought to be affirmed. In *Moses vs Macferlan*, 2 *Burr.* 1012, Ld. *Mansfield* says "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity*, to *refund* the money." *Evans*, in his Essays, 17, speaking of a failure of consideration by the misconduct of the defendant, refers to the case of *Dutch vs Warren*, which is particularly adverted to by Ld. *Mansfield* in *Moses vs Macferlan*. That case was as follows: Upon the 18th of August 1720, on payment of £262 10, by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the *Welch* copper mines, at the opening of the books; and for security of his so doing gave him this note:

18th of August 1720. I do hereby acknowledge to have received of *Philip Dutch* £262 10, as a consideration for the purchase of five shares; which I do hereby promise to transfer to the said *Philip Dutch* as soon as the books are opened; being five shares in the *Welch* copper mines. Witness my hand. *Robert Warren.* The books were opened on the 22d of the same month, when *Dutch* requested *Warren* to transfer to him the said five shares, which he refused to do; and told the plaintiff he might take his remedy. Whereupon the plaintiff brought an action for money had and received, for the consideration money paid by him. An objection was taken at the trial, that the action would not lie; but that the action should have been brought for the nonperformance of the contract. But the objection was overruled by the court, who left it to the consideration of the jury, whether they would not make the price of the said stock as it was upon the 22d of August, when it should have been delivered, the measure of the damages; which they did; and gave the plaintiff but £175 damages. And a case being made for the opinion of the court of common pleas, the action was resolved to be well brought. The court said, that the extending those actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud; and it is at the *election* of the party injured either to affirm the agreement, by bringing an action for the nonperformance of it; or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use. So in the case now before this court, if it had been the duty of the defendant to deliver the negro to the plaintiff, and he had refused to do so according to contract, the plaintiff would have had the right of electing either to have affirmed the agreement, by bringing an action for the nonperformance of it, or to have disaffirmed it *ab initio*, by reason of the fraud, and to have brought an action for money had and received to his use; but the evidence is full and explicit, that from the performance of that duty he was expressly discharged by the plaintiff himself. The other two counts being for the nondelivery of the slave, according to the contracts as therein stated, it follows, of course, that the judgment of the court below supporting the action, must be reversed. On payment of the pur-

chase money by *Barron* to *Murphey*, the property vested in *Barron*, and his proper remedy to redress the injury he had sustained, would have been a special action on the case against *Murphey* for enticing or persuading his slave to abscond from his service.

JUDGMENT REVERSED.

LEADENHAM'S, Ex'r. *vs.* NICHOLSON, *et al.*—June, 1827.

The lands of an intestate being incapable of a beneficial division, on the petition of his heirs, and by the order of the court of chancery, were sold, and the sale ratified, after this ratification, and as to part of the proceeds prior to any order or decree adjudging who was entitled thereto, one of the heirs, a married woman, died, her husband, who survived her, was a party to the petition, also died. *Held*, that the husband's representatives were not entitled to the wife's portion of that part of the proceeds of her father's estate, respecting which no order or decree of distribution had been passed at the time of the husband's death, but that it belonged to her personal representatives.

The representatives of a husband who survived his wife, are entitled to the *choses in action* of the wife, where the husband had either reduced them into possession, or obtained judgment for them at law or in equity, either in his own favour, or in favour of himself and wife.

In equity money directed to be laid out in land, will before investment, be considered as land; and land directed to be sold and converted into money, will, before a sale, be considered as money, and pass as such.

On an appeal from chancery, the appellate court decrees only in relation to the rights of those who are parties to the appeal.

APPEAL from the Court of Chancery. The nature of the case will sufficiently appear from the decree of the chancellor, and the statement made by the judge who delivered the opinion of this court.

BLAND, Chancellor, (September term, 1824,) It appears that *Joseph Williams* died seized in fee of about 175 acres of land, and having made no will, it descended, according to law, to his children, *Thomas*, *Joseph*, *Sarah* the wife of *Knighton*, *Mary* the wife of *Leadenham*, and *Elizabeth Ann Ball*, the granddaughter and heir of the intestate's daughter *Elizabeth*. The land being admitted to be incapable of division was ordered to be sold. *Thomas* became the purchaser at the sale; but, after giving bond for the purchase money, he sold the

whole, including the right to his own share, to *James Nicholson*, who it was agreed should, as to all liability and benefit, exactly assume his place. No notice was taken in the bill, nor in the answer, nor in the order of sale, nor in the sale itself, of the fact, that *John Ball* the grandson of the intestate, and father of the defendant *Elizabeth Ann Ball*, had left a widow, who was entitled to dower in the undivided share which her husband had inherited from his grandfather. But this circumstance, and the claim of *John Ball's* widow, who had become the wife of *Samuel Jones*, was, after the sale, brought before the court by their petition, in which they ask only for an equivalent out of the proceeds. *Benjamin Welch*, having administered on the estate of *John Ball*, made sundry disbursements and payments in the course of his administration; and, on the final settlement of his accounts, it appeared that the assets and personal estate of *his* intestate had been wholly exhausted, and that he had overpaid. Whereupon he came into court to ask for a reimbursement, *as a creditor*, out of so much of the proceeds of the real estate of his intestate as might be within reach of the court. And, it being one of the ordinary and peculiar powers of this court, under such circumstances, to apply the *real* estate, after the *personal* had been exhausted, to the payment of the debts of the deceased owner, he was ordered to be paid accordingly. It further appears, that sundry portions of the proceeds of the sale of the real estate of the intestate have been collected and distributed under the authority of the court; and that suits were brought, and judgments obtained by the trustee against the purchaser of the land, for the purchase money; when, in the spring of the year 1821, *Mary*, the wife of *Leadenham*, died without ever having had any issue; and in August of the same year her husband died.

The most important and leading question in this case is, whether so much of the proceeds of *Mary's* share of the land she inherited from her father, as was not collected and distributed, or actually paid over, shall descend or pass as the land itself would have gone, or, like personal property, be considered as vested in her husband, and be paid over to his representatives. The determination of this question must depend upon the effect which the proceedings of this court may have had, if any,

in producing a change in the nature of the estate of *Mary*. In the fee simple estate of *Mary*, her husband had no transmissible or permanent interest whatever; never having had issue by her, born alive, he could not have been tenant by the curtesy after her death. During the coverture he was merely the possessor and steward in right of his wife. The object of *Mary*, and her coheirs, in bringing their case before this court, was to have their respective portions given to them in severalty. And, in order to obtain this object, they consented, and the court awarded, that a sale should be made, and the proceeds brought into court to be divided. To effect this purpose the court appointed a trustee, who it directed to sell, and in its order of sale, among other things, says "and on the ratification of the sale and receipt of the purchase money, *and not before*, the trustee shall, by a good deed acknowledged according to law, convey to the purchaser." In pursuance of this order the sale was made. Since this question has, in no instance, so far as I can learn, been directly decided, it must now be determined upon principle and by analogy.

Upon a writ of partition, according to the common law, there are two judgments. After the confession of the action, or issue tried for the plaintiff, there is a judgment *quod partitio fiat*, upon which a writ is issued, commanding the sheriff to make partition; which is done and returned to the court by him, and the twelve jurors under their hands and seals. Whereupon the final judgment of the court is, "therefore it is considered, that the aforesaid partition be holden firm and effectual forever, &c." This judgment, when made by writ, after the appearance of the party, shall not be defeated even though made against a *feme covert*, or though not equal, and any one of the parties be an infant. 2 *Sellon's Pr.* 222. In this case, it is evident, that the nature of the estate is not changed by the judicial proceedings until after the final judgment. And, until that point of time, the same consequences would ensue on the death of a joint tenant or parcener, as if no judicial proceedings had been commenced for the purpose of effecting a partition.

It is said by Lord *Redesdale*, that partition at law and in equity are different things. The first operates by judgment of

law, and delivery up of possession in pursuance of it, which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyances, the partition cannot be effectually had. *Whaley vs Dawson*, 2 *Sch. & Lef.* 372. But the difference here spoken of clearly relates to the mode of proceeding, not to the stage of the judicial proceeding when the estate ceases to be joint and becomes an estate in severalty; as to which there is, evidently, no difference between the principles of law and equity. At law this mutation is effected by the final judgment, which is the last act of the court, when the parties are dismissed without further day in court, the whole object of the suit having been fully attained; so, too, in equity, when the conveyances are executed by the parties, and approved by the chancellor, there is an end of the suit, and the nature of the estate is finally and conclusively changed, and the court has no further power over the subject that had been submitted to it. Similar views of this matter seem to have been taken in a neighbouring state, in a case where a question analogous to that now under consideration was determined by the court. *Yohe vs Barnet*, 1 *Binney*, 364.

The acts of assembly of this state have made provision for the partition of the estates of intestates by the courts of law, and also by the courts of equity. The courts of law are not merely invested with power to make partition; but the mode of proceeding in such cases is, in many respects, directed and specified. On the other hand the courts of equity are clothed with authority to make partition, and there is no specification of the *mode* in which they shall proceed, at least so far as regards this question now under consideration. In the case of *The State use of Rogers vs Krebs & others*, (6 *Harr. & Johns.* 31,) determined by the court of appeals at June term, 1823, it appeared that application had been made to a court of law to make partition of an intestate's estate, and in order to effect the division sought for, the estate was sold, and the purchase money paid into the hands of the commissioners, and the judicial proceeding at an end. The question was, whether the share of a *feme covert*, in that situation, should be considered as *real* or

*personal* property? The court of appeals recite that the "laws direct the commissioners, who have sold for cash, after the ratification of the sale, and the deduction of the expenses to be ascertained by the court, to divide justly the purchase money among the several persons interested, according to their respective titles to the estate; and when the estate is sold by the commissioners on a credit, bonds are to be taken by them for the purchase money, *to each representative respectively*, according to his or her proportional part of the net amount of sales." And then they declare their opinion to be, "that the mutation of her estate from real to personal, may be determined to be complete, when the commissioners' sale is *ratified* by the court, and the purchaser has *complied with the terms of it*, by paying the money, if the sale is for cash, or by giving bonds *to the representatives*, if the sale is on a credit. The bond passed to the wife by the purchaser is a *chose in action*, as is the money in the hands of the commissioners, if withheld from her; both liable to be sued for and recovered by the husband at his pleasure."

Hence it appears that the point of time when the partition was complete, and the estate and the nature of the property changed, was that, when the court had *finally* acted upon the case, and the proceeds were paid over, secured, or placed under the *entire control* of the husband, without being obliged to apply to a court of chancery to enable him to obtain possession of them. It may be regarded as a general rule, that a court of equity will, in all cases, carefully preserve the character or nature of the estate, so as to leave an infant or a *feme covert* in the unimpaired enjoyment of every right, privilege, or control over the property, which might have been exercised when, and in the shape in which it originally vested. As where the money of an infant is laid out in the purchase of land. It may be for the benefit of an infant, in many cases, that the money should be laid out in land, if he should live to become adult; but if he does not, it is a great prejudice to him, taking away his dominion, by the power of disposition he has over personal property, so long before he has it over real estate. The court, therefore, with reference to his situation, even during infancy, as to his powers over property, works the change, not to all

intents and purposes, but with this qualification, that if he lives he may take it as real estate, but without prejudice to his right over it during infancy as personal property. 1 *Madd. Ch.* 340. So, in this case, the court will continue, to the very last exercise of its authority, to consider this property as *Mary's* real estate; because to treat it as personalty would be virtually to make a transfer of it to her husband, and deprive her of her privilege of coming into this court and asking to have it secured to her separate use. *Attorney General vs Whorwood*, 1 *Ves.* 539. *Co. Litt.* 351, *a*, *(note* 1.*)* From these authorities, and from others of a similar nature which might be referred to, this principle is clear, that, whether the parties apply to a court of law, or to a court of equity, no change is produced by the mere operation of the judicial proceedings, either in the *character* of the estate, or in the *nature* of the property, in reference to the *rights and power* of its owner, until the tribunal has acted conclusively and definitively upon the case. But in this instance, although the sale has been long since made, the whole of the purchase money has not even yet been collected; and only a part of that which has been received has been distributed. Nothing definitive has been, or can even now be done. *Mary's* husband could not have received any part of the proceeds of this property without the express order of this court; because no right to it had been, by any act of the court, finally transferred to, and vested in him. If *Mary* had at any time, during her life, asked of this court to have secured the proceeds of her share, before they were paid over, to her separate use independently of her husband, her request could not have been refused. No conveyance for the land has yet been made by the trustee to the purchaser; and the conveyance has been expressly ordered to be withheld until the court is informed, that the whole of the purchase money had been paid. There is, then, much yet remaining to be done before this case can be finally closed; and consequently, so far, no final change has been wrought by the proceedings in this case in the character of the estate, or the nature of the property as respects the destination of *Mary's* share after her death. Since nothing having been vested in her husband, or placed under his control finally and independently of this court, except that portion of

the proceeds which had been actually paid to him before her death; all that now remains of *Mary's* share must descend and pass as her land would have done, of the nature of which it is, to *her* heirs, and not to the representatives of her husband.

The consequence of this conclusion is, that *John Leeds Kerr's* claim, founded on an assignment of a part of the contingent expectancy of *Mary's* husband, must be altogether rejected. But as to the introduction of claims of this sort, in this manner, I would observe, as a general rule, that the court will not allow a claim of this description, wholly distinct in its origin and merits from the principal case, to be thus introduced and decided, merely because the fund, out of which payment is claimed, happens to be either in court, or about to be brought in. Because, in cases of this importance, concerning land, the proceedings of which are directed to be recorded, it is highly improper that they should be expensively and unnecessarily incumbered with any matter foreign to the immediate subject of the suit. There is no peculiar equitable ground upon which *Kerr's* claim can be brought into this case similar to that on which *Welch's* claim is rested; nor has he succeeded to an entire share, as is admitted to be the case of *Nicholson.* Therefore, on every account *Kerr's* claim must be rejected. There is another excrescence with which this case has been incumbered and disfigured that ought not to have been allowed; that is the injunction bill *(a.)* All, or the principal portion of the equity of that bill, was to be found in the proceedings of this case; this injunction, therefore, was not an *original*, but strictly and properly a proceeding auxiliary to this case with which its equity is so intimately interwoven; and, consequently, should have been obtained by a concise petition, and not by a distinct original bill.

The share of *John Ball*, the grandson of the intestate, descended to his daughter *Elizabeth Ann Ball*, incumbered with debt and dower; therefore, from her share, the claim of *Welch* must be first deducted, and from the remainder the dower of

*(a)* That injunction was obtained by *Nicholson*, the purchaser of the land from *T. Williams*, and one of the grounds was a claim of a credit to that portion of the money that *T. Williams* was entitled to, (who had transferred it to *Nicholson,*) out of the share that would have gone to Mrs. *Leadenham*, if alive.

*Elizabeth*, now the wife of *Samuel Jones*, must be next deducted. She appears to have been only eighteen years of age when her right to dower accrued; she will, therefore, according to the rule of the court, be allowed one sixth of the share her husband was entitled to; but as she has been so tardy and negligent in making her claim, she will be allowed no interest.

But as no final decree can be had in this case, until the court is furnished with an account of the amount due to each claimant, estimated upon the principles before laid down, the case must be referred to the auditor for that purpose. And he is directed to ascertain from the trustee the whole amount received by him, and the amount he has heretofore distributed; to state what has been paid to *Mary*, or her husband, before her death; that is, assuming from the proofs that her death happened before the 1st of June 1821; and after deducting that amount, together with that which has been upon similar principles distributed to the other heirs, the residue to be divided among the surviving heirs of the intestate, upon the principles before mentioned. *Nicholson* is to be considered as the assignee of the share of *Thomas;* and an account must be so stated as to show the real balance, if any, due on the judgment against *Nicholson*. And the injunction heretofore issued on his behalf shall be continued until the auditor has made his report, or further order.

The auditor made his report accordingly, and the chancellor passed a final decree directing how the balance of the proceeds, received or to be received, were to be distributed, &c. excluding the claim of the executor of *Leadenham* to any portion of such balance. From which decree the executor of *Leadenham* appealed to this court.

The cause was argued at the last June term, before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and DORSEY, J.

*R. Johnson*, for the Appellant, referred to the act of 1819, *ch*, 144, *s*. 6. *The State use of Rogers vs Krebs, et al.* 6 *Harr. & Johns.* 31.

*Mitchell* and *Brewer*, jr. for the Appellees. They referred to the acts of 1785, *ch.* 72, *s.* 12, and 1798, *ch.* 101, *sub ch.* 5, *s.* 8. *Cooper's Plead.* 64 to 69. *Wright vs Morley*, 11 *Ves.*

13. *Stevens vs Richardson*, 6 *Harr. & Johns.* 156. *Jarrett's Lessee vs Cooley*, *Ib.* 258. *Wildman vs Wildman*, 9 *Ves.* 176. *Mitford vs Mitford*, *Ib.* 87. *Richards vs Chambers*, 10 *Ves.* 587. *Murray vs Ld. Elibank*, 13 *Ves.* 5. *Dunscomb vs Dunscomb*, 1 *Johns. Ch. Rep.* 510. *Genet vs Tallmadge*, *Ib.* 563. *Heygate vs Annesley*, 3 *Bro. Ch. Rep.* 362, *(note a.)* *Blount vs Bestland*, 5 *Ves.* 515, *(note* 1.) *Anonymous*, 3 *Atk.* 726, case 276. *Bond vs Simmons*, *Ib.* 21. *Pearson vs Brereton*, *Ib.* 72. 1 *Madd. Ch.* 269, 270, 380, 388. *Davidson vs Clayland*, 1 *Harr. & Johns.* 546.

*R. Johnson*, in reply, referred to the act of 1802, *ch.* 94, *s.* 6. *Heygate vs Annesley*, 3 *Bro. Ch. Rep.* 362, *(notes.)* *Murray vs Ld. Elibank*, 13 *Ves.* 5.

*Curia adv. vult.*

DORSEY, J. at this term delivered the opinion of the Court. In May 1816, *Thomas* and *Joseph Williams*, *Gassaway Knighton*, and *Sarah* his wife, and *Edward Leadenham*, and *Mary* his wife, exhibited their bill in chancery against *Elizabeth Ann Ball*, setting forth that a certain *Joseph Williams* died intestate and seized of about 175 acres of land in *Anne-Arundel* county, leaving the said complainants, *Thomas*, *Joseph*, *Mary* and *Sarah*, and a certain *Ann Bird*, the wife of *John Bird*, his children, and a grandson named *John Ball*, the son of a deceased daughter *Elizabeth*, his heirs, to whom the said land descended. That *John Bird* died intestate and without issue; and that *John Ball* had also departed this life, leaving a child named *Elizabeth Ann Ball*, a minor, to whom his interest in said land descended. The bill further stated, that the land could not be divided beneficially to all concerned, and prayed for a decree for sale or division. In August 1816 the answer of the minor was filed, assenting to a sale of the land, and on the 31st of the same month, a decree for the sale passed, in the usual form, on a credit of twelve months, the purchaser to give bond with security, bearing interest. In January 1817, the trustee reported the sale of the land in the preceding November for $7350, to *Thomas Williams*, who had given bond for the purchase money agreeably to the decree. Which report was finally ratified by the chancellor in

March 1817. In September 1818, the auditor stated the account, &c. and distributed the proceeds of sale, after deducting the expenses, into five shares of $1440 91 each, to *Thomas Williams*, *Joseph Williams*, *Knighton* and wife, *Leadenham* and wife, and *Elizabeth Anne Ball;* on which account no order appears to have been taken by the chancellor. In November 1820, the auditor stated a second account, distributing $3000 received of the proceeds of sale, among the same distributees named in his first account, which was paid to them accordingly. On the first of June 1824, the auditor stated a third account, distributing in like manner $5185 78, except that of *Leadenham* and wife's proportion $120 was allowed to *John Leeds Kerr*, on an order drawn by *Edward Leadenham* on the 27th of January 1820. Which third account was, in common form ratified by the chancellor on the 7th of June 1824, and on the same day he rescinded the order of ratification as far as respects the distributive share of *Leadenham* and wife. On the 16th of the ensuing July, *Noah Leadenham* filed his petition in the court of chancery, setting forth all the proceedings in that court under the bill filed as aforementioned, and that judgments were recovered by the trustee against the principal and his securities, on the bond given for the purchase money of the land in 1819, and that previously thereto *Thomas Williams*, the purchaser, transferred to *Joseph* and *James Nicholson*, his securities, all his right of purchase in said land, and released to them his right to one-fifth part of the said purchase money. That *Joseph* and *James Nicholson*, to secure the payment of said purchase money to the trustee, assigned to him the single bill of a certain *Walter Claggett*, for $6453, on which the trustee recovered judgment in 1822, and upon a *fieri facias* issued thereon, received $5185 78, the sum of money on the distribution of which the present controversy arises. The petition also stating and establishing by accompanying depositions that *Mary Leadenham* died in February 1821, and *Edward Leadenham*, her husband, in August following; the prayer of the petition was that the chancellor would pass an order directing the trustee to pay to the petitioner, as executor of *Edward Leadenham*, the amount to which *Edward Leadenham* was entitled; and for general relief.

The principal question in this cause, and that from the chancellor's decision of which the present appeal hath originated, is simply this—Does *Mary Leadenham's* share of the aforesaid $5185 78 vest in the executor of her husband, or survive to her representatives? In the solution of this question, the first point to be examined is, what was the nature of *Mary Leadenham's* interest in the fund in controversy, at the time of her death? Was it realty or was it personalty? If the former, then *Edward Leadenham*, never having had issue by his wife, had not even the shadow of a claim, and the fund descended to the heirs at law of the wife. This was the opinion of the chancellor. In support of which the counsel for the appellees have referred to many cases, arising under a well established rule in equity, that money directed to be laid out in land will, before investment, be considered as land; and land, directed to be sold and converted into money, will before a sale, be considered as money, and pass as such.

The applicability of the authorities cited has not been discovered; this case not being embraced by either branch of the rule. It is not money, ordered to be invested in land, but money arising from land sold; and is, therefore, free from the operation of the first part of the rule. And if, contrary to the fact, it be conceded to be land to be converted into money, the latter part of the rule repudiates the idea of its being viewed as land, and stamps upon it a personal character. The case of *Yohe vs Barnet's Adm'r.* 1 *Binney*, 358, referred to in the chancellor's decretal order, is a very strong adjudication to prove that *Mary Leadenham's* interest was merely personal. But this principle has been settled by this court in the case of *The State use of Rogers vs Krebs, et al. Garnishees of Horne*, 5 *Harr. & Johns.* 31, in which it became necessary to decide at what time a change took place in the nature of the real estate of a *feme covert* sold by commissioners appointed under the act to direct descents. And after great deliberation it was adjudged, "that the mutation of her estate from real to personal may be determined to be complete, when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it, by paying the money, if the sale is for cash, or by giving bonds to the representatives, if the sale

is on a credit." It is true this was a decision at law; but it violates no rule or principle of equity; nor does any sound reason appear why, in cases like the present, the same rule should not prevail in equity, which exists at law. We therefore disagree with the chancellor in considering *Mary Leadenham's* share "as her land," descending "to her heirs." Nor can we admit that the determination of this cause must depend upon the effect which the proceedings of the court of chancery may have had in changing the nature of the estate of *Mary*. The appellant has no claim to it, whether it be considered as real or as personal property.

The interest of *Mary*, at the time of her death, is viewed by this court in the nature of an equitable *chose in action*, for the payment of which to husband and wife, or either of them, no order was passed by the chancellor; for the recovery of which nothing has been done to entitle the representatives of the husband to claim under the act of assembly, or otherwise; it therefore survives to the personal representatives of *Mary Leadenham*, and not to her heirs at law, as decreed by the chancellor.

To show the extent to which the rights of the husband are carried in a court of equity, the note to the case of *Heygate vs Annesley*, 3 *Bro. Ch. Rep.* 362, has been referred to, which note professing to give the decision in *Forbes vs Phipps*, 1 *Eden*, 502, states it to have been there decided, that "where a *feme covert*, being entitled to a share of the residue of a testator's estate, upon a bill filed by another residuary legatee, to which she and her husband were defendants, a decree had been made for a sale of the estate and payment, Lord *Northington* held, that the share vested absolutely in the husband by the decree, and that the wife surviving was not entitled." How the learned annotator, in extracting the principle of a decision reported by himself, could have so egregiously erred in his statement both of law and fact, it is difficult to conceive. The case of *Forbes vs Phipps* was not, (as it would appear to be by the above mentioned note,) a contest between the surviving wife and the representatives of the husband, but between the surviving husband and the representatives of the wife; and the decree was, according to all the authorities both

at law and in equity, that the surviving husband was absolutely entitled.

The provisions of the act of assembly 1798, *ch.* 101, *sub. ch.* 5, *s.* 8, although introduced into the argument, can be of no avail to the appellant, as *Edward Leadenham*, after his wife's death, neither reduced her *chose in action* into possession, nor obtained judgment thereon. Independently of this act of assembly the executor of the surviving husband has not a shadow of claim. 'Tis true a decree has passed, in the lifetime of the wife, for the sale of her land, in a cause to which she and her husband were parties. But that proceeding directs a sale of the property, and the proceeds to be brought into court. It professes not to ascertain the rights of the respective claimants; it makes no distribution; it awards no payment, either immediately or contingently, to husband and wife, or either of them; no such decree has passed as is equivalent to a judgment at law, which would vest the chose of the wife absolutely in the surviving husband. If the decree had directed the proceeds of sale to be paid to the husband and wife, or the husband alone; or if the chancellor had made the usual order of ratification of the auditor's statement, directing the trustee to pay over accordingly, then would the representatives of the husband have been clearly entitled. But this has not been done.

Several questions of law, as to the form of proceeding, the regularity of the appeal, and the admissibility of testimony, were raised by the appellees, which our opinion on the main question renders it unnecessary to decide.

As to that part of the litigated fund which was assigned to *John Leeds Kerr*, the allowance of which by the auditor was rejected by the chancellor, this court can make no decree, *Kerr* being no party before us. Nor are we authorised to reverse the chancellor's decree as to the residue of that fund, the personal representatives of *Mary Leadenham* not appearing as appellants, and the executor of *Edward Leadenham* having no interest in the subject matter. We can therefore only do what the chancellor, according to our view of the case, ought to have done, with respect to the appellant's petition—decree its dismissal, with costs. *Decreed*, that the appeal be dismiss-

ed, and that the petition of the appellant in the court of chancery be also dismissed, with costs, &c.

APPEAL DISMISSED, &c.

## BUCHANAN *vs.* DESHON, *et al.*—June, 1827.

An agreement between a man and his intended wife, in consideration of marriage, (which had none of the legal attributes of a marriage settlement, so as to overreach the claims of creditors,) to secure to her, for her own use, an annuity for life, may, after the marriage and the husband's death, be enforced by the wife against his representatives; and his estate, being insufficient to pay his debts, she will be treated as a general creditor to the extent of her claims under the agreement, and her dividend so invested, as to produce as much of the annuity as practicable. But in this case, the widow having only claimed payment of her annuity from the time of the death of her husband, her dividend was estimated upon its arrearages, from that time to the sale of his estate, and the interest which had accrued thereon.

By the same agreement, the children of the marriage, succeeding to the rights of the wife, the dividend of the husband's estate, invested for the benefit of the mother, will after her death, be divided equally among the children and their proper representatives.

An alien may purchase lands and hold them against every one, except the state, until office found, or until the government shall exercise its authority over them; but by the common law a *feme covert*, being an alien, is not entitled to be endowed, nor to inherit.

The act of 1813, *ch.* 100, does not authorise the endowment of a female alien, who during her coverture, never resided in the *United States*.

APPEAL from the Court of Chancery. The bill in this case was filed on the 1st of July 1818, by the appellees against *Esther Buchanan*, and others, as heirs at law of *William Buchanan*, deceased, for a sale of his real estate for the payment of debts due by him to the appellees. The answers admit the deficiency of personal assets, and the defendants assent to the sale of the real estate. They also state that they understand their mother, (who is the present appellant,) was a creditor also of the deceased under a marriage contract between her and the deceased, and refer to the same as it should be exhibited by their said mother. A decree passed as prayed for, and the appellant, under the usual order in such cases for creditors to exhibit their claims, filed two petitions on the 9th of May 1820. The first praying to be allowed a dower interest in the proceeds of the property to be sold; and the second exhibiting the marriage

contract between herself and the deceased, which is referred to by the answers, and praying to be allowed out of the said proceeds the amount due to her by the terms of the said contract, from the death of her husband.

The marriage contract here referred to, bears date on the 7th Prairial of the 12th year of the *French* Republic, (27th of May 1803,) and is stated to have been entered into "before certain Notaries Public of the *Isle of France*, between *William Buchanan*, consul of the *United States* of *America* for the *Islands of France* and *Bourbon*, residing in the N. W. port of the *Island of France*, being of age, a native of *Baltimore*, state of *Maryland*, *United States* of *America*, stipulating for himself, and in his own name, of the one part, and *Joseph Merven*, residing in this place," &c. "stipulating for Miss *Maria Emelia Louisa Merven*, a native of this colony, now under age, his daughter; and Miss *Merven*, residing with her father, stipulating likewise for herself and in her own name, of the other part. Who in presence of their relations and friends hereafter named, to wit," &c. "have agreed as follows upon the civil conditions of the marriage which will immediately take place between Mr. *Buchanan* and Miss *Merven*." The only articles in the contract which seem to be necessary to be inserted are—"*Article* 8. The future husband has endowed, and endows his intended wife with an annuity of two thousand effective hard *Spanish* Piasters, by the name of a settlement, *(douaire prefix*, or prefixed dower,) and exempt from all deduction, which she shall enjoy immediately upon the opening of said dower; the principal *(fonds, or funds,)* of which dower, at the rate of five *per cent.* shall go to the children which shall spring from the marriage of the future husband." "*Article* 9. The future husband makes by these presents a donation, in the best form that a donation can be rendered valid or take place, to his intended wife, who assents thereto under the authorization of Mr. *Merven*, her father, of all which the *French* or foreign laws permit him to dispose of, in any property which the said future husband may possess at the day of his death, in *France* and in foreign countries, whether there be then children in existence or to be born of the intended marriage or not. Should any children, living at the death of the

future husband, afterwards die before or after coming of age, and before the intended wife, without having disposed of their property, and without legitimate issue, in that case the intended wife shall take the amount of the donation as if there had been no children." "*Article* 10. The future husband reserves to himself the power of disposing of one-fourth of his property." [This translation of the marriage contract was made and agreed to at theargument in this court, on the appeal.] The property was (afterwards) sold by the trustee appointed by the chancellor to make sale thereof, for $14,230, and the proceeds brought into the court of chancery for distribution. The auditor, under the orders of the chancellor, stated several accounts, which were submitted, &c. Other facts established in the cause, will appear in the opinion delivered by

BLAND, Chancellor, (May 4th, 1825.) The claim of *Maria E. L. Buchanan*, designated in the auditor's report of the 30th of November 1820, as claim No. 6, has been presented in various points of view, and in every shape is met by strong objections. She is an alien, who never was in this country until after the death of her husband; and therefore, can take no benefit under the act of 1813, *ch.* 100. Consequently, she is not dowable, according to our law, of any real estate lying in this state, of which her husband was seized at any time during the coverture. As an alien, she might take and hold real estate lying in this state, against all but the state, under the marriage contract. But that contract was, in no respect, made and executed in such manner and form as the laws of this state require conveyances of real estate in *Maryland* to be made and executed; and, besides, it has no reference whatever to the lands mentioned in this case, or indeed to any real property in this state.

A court of equity will decree the execution of a marriage contract, by which the husband binds himself to settle upon his intended wife all the personal property which he should at any time during coverture be possessed of. Thus making the covenant attach upon each article, that should, from time to time, come into the possession of the husband. But in the eighth article of the contract, now under consideration, by which

alone, if at all, this claim can be sustained, there is no general or specific designation of any property whatever, either real or personal.

The translation of the marriage contract is, in many respects, very defective. It appears, however, to have been made according to the legal forms usual in those countries governed chiefly by the civil law; and in reference to that code, as modified by the customs of *Paris*, by which, it is believed, the *Isle of France*, where the parties then lived, as well as all the other *French* colonies, were governed. The first part of the eighth article of this contract, on which this claim is said to be founded, speaks of a settlement to be made on the intended wife, to take effect on the marriage, of an income or jointure, (for *dower*, in the sense of our law it cannot be,) to be secured to her separate use, independently of her husband; in such manner, as was, no doubt, well known to the law of the place where the contract was made And, it then closes with declaring, that the capital of that income estimated at five *per cent.* should descend and pass to the issue of that wife by that marriage. It is a covenant, on the part of the husband, to settle upon his intended wife a jointure of a specified value, and of a particular character known to the laws of the *Isle of France; "douaire prefix,"* an endowment in frank bank, or a peculiar species of marriage settlement, by which no particular kind or parcel of property whatever was specially designated and described; and, therefore, it never could have been considered, according to our law, as giving to the wife or children a lien or claim of any kind upon any property of which the husband ever was, at any time, seized or possessed.

But marriage, even at law, will not extinguish any prior contract between the parties upon which a right of action cannot accrue during the coverture. As, where the intended husband covenanted to pay a certain sum of money to the intended wife, if she should survive him, or within a given time after his death; it was held, that the covenant was valid, and that the widow might recover the sum stipulated to be paid, from the executor of her deceased husband.

But the contract, in this case, does not merely stipulate for the payment of money upon the happening of a certain con-

tingency, and nothing more. It is not a mere obligation for the payment of money by the husband to the wife in the event of her surviving him; but it is a marriage settlement, in which an income or jointure of a certain value is to be secured to the wife during her life, and after her death the capital of that income, at five *per cent.* is to go to her children by that marriage. The eighth article contemplates, as a part of the general settlement, the creation of one entire estate, out of funds, real or personal, to be provided by the husband, the income, or present beneficial interest in which, was to be vested in the wife for life, with remainder over to her children. There is nothing in the general sense, object, and scope of the article, which can warrant a court of justice in treating it as a mere obligation to pay a debt, or sum of money in gross, or in considering the widow, under it, as a mere creditor of her late husband. In short, a covenant, in contemplation of marriage, to create an estate for the benefit of a wife and children, cannot, by an undue degree of liberality, be made to mean an obligation to pay a debt, or sum of money to the wife, to the prejudice of real *bona fide* creditors. This claim of *Maria E. L. Buchanan* must, therefore, be rejected.

These principles being thus settled and determined, the case is hereby again referred to the auditor, with directions to state an account accordingly, and to report the same to the chancellor preparatory to a final order for a distribution of the funds in the hands of the trustee. From this decretal order Mrs. *Buchanan* appealed to this Court

The case was argued at the last June term, before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and DORSEY, J.

*R. Johnson*, for the Appellant, contended,

1. That the appellant was entitled to dower at common law, independently of the act of 1813, *ch.* 100.

2. If she was not so entitled, she is entitled to dower under the act of 1813, *ch.* 100.

3. If she is not entitled under that act, then she is entitled under the marriage contract.

4. She is entitled to come in as a preferred creditor under that contract.

5. She is entitled to claim her dower, and also a right to claim as creditor.

1. Is she entitled at common law? This is not a question between the state and Mrs. *Buchanan*, she being an alien. The land has been sold, and the question is between her and the creditors. It is laid down as a general rule, that an alien wife cannot be endowed. That is, she cannot claim against the state; not that she cannot claim against an individual. Her claim is good against all but the state. There had been no decision that an alien *feme covert* was not entitled to dower, and the object of the act of 1813, *ch.* 100, was to give to her the state's interest. An alien may acquire property by purchase for his own benefit; and no person can contest his right, but the state may. 1 *Bac. Ab.* tit. *Alien*, 8. *M'Creery's Lessee vs Allender*, 4 *Harr. & M'Hen.* 409. *M'Creery's Lessee vs Wilson*, *Ib.* 412. *Co. Litt.* 2, b, *(note* 3.*)* *Page's* case, 5 *Coke*, 52, b. *Mooers vs White*, 6 *Johns. Ch. Rep.* 360. *Orr vs Hodgson*, 4 *Wheaton*, 453. 2 *Blk. Com.* 132, 241.

2. If she is not entitled at common law, she is entitled under the act of 1813, *ch.* 100. This act was in force at the time of the death of the husband, then at the *Isle of France*. On his death his widow came to this country, and has resided ever since. It is admitted she was never here during the life of her husband. Her husband was a public agent of the government of the *United States;* and in construction of law his residence continued to be within the *United States*. An enlarged construction should be given to the act in favour of the widow. She has resided here *since her marriage*, although not during her marriage. This right of the widow is also secured to her by the act of March 1780, *ch.* 8, *s.* 2, and the *seventh article* of the convention between the *United States* and *France* of the 30th September 1800.

3. She is entitled to dower under the marriage contract. For this purpose the 8th and 9th articles only of that contract are important. A marriage settlement is to be construed liberally. If in a devise it would apply to real as well as to personal estate, then under the *ninth* article it vested, one third in her of his real estate. She is to be considered as a purchaser. 2 *Blk. Com.* 292, 293. *Higgenson vs Kelly*, 1 *Ball & Beatty*, 252. *Parkes vs White*, 11 *Ves.* 235.

4. She is entitled to come in as a preferred creditor under the marriage contract. It was not void as to creditors; because there were no creditors at the date of the contract. But whether there was or was not a creditor at that time or since, a marriage contract is valid against prior as well as subsequent creditors. *Nairn vs Prowse*, 6 *Ves.* 759. *Reade vs Livingston*, 3 *Johns. Ch. Rep.* 494. By the 8th article of the contract she is to be considered as a creditor. The husband thereby covenanted that on his death his wife should receive an annuity of $2000. 5 *Bac. Ab.* tit. *Obligations*, 155. She is entitled to come in as a preferred creditor to the amount of her annuity. The husband having set no estate apart to pay her, makes no difference. He left no estate but the land out of which the fund in question has arisen; and it will be presumed that she should be paid out of it.

5. The allowance of the annuity is not stated to be in lieu of her dower; and the 9th article shows that it was not so intended. *Birmingham vs Kirwan*, 2 *Sch. & Lef.* 451. *Foster vs Cook*, 3 *Bro. Ch. Rep.* 347.

*Marriott*, for the Appellees. The claim of the appellant is to be considered in a two-fold view. 1. As to her dower at common law, or under the act of 1813, *ch.* 100. 2. As to her claim under the marriage contract.

1. It is well settled that an alien is not entitled to dower at common law. *Co. Litt.* 31, *(note* 9.*)* 1 *Bac. Ab.* tit. *Alien*, (C) 136 *Kelly vs Harrison*, 2 *Johns. Cas.* 29. The appellant never had a capacity to take. She never had any vested right. *Vat. L. N.* 102. The act of 1813, *ch.* 100, shows that there could be no claim to dower at common law, or that act would not have passed. That act gives dower only to married women being aliens, who may have been married in this country, and who reside here with their husbands, or at least they must be residents here at the time of the deaths of their husbands. The wife must reside here after her marriage—meaning she must reside here after and during her marriage in the lifetime of her husband, and not that she might come here and reside after the death of her husband. If that were the case she might, after the death of her husband, come here and reside

one week, receive her dower, and return to her own country. This was not the intention of the act of assembly, and it is not within its sound construction. The act of March 1780, *ch.* 8, is not applicable to this case. That act was predicated upon the then existing treaty between this country and *France* in 1778, which treaty has been since annulled by an act of congress in 1799. Congress alone could, since the adoption of the constitution, pass acts of naturalization; and they legislated upon this subject as early as 1790. The convention between the *United States* and *France* of 1800, expired in 1808, before any vested right accrued to the appellant, even if she could have claimed under it were it now in existence.

2. The contract relied on as a marriage settlement is not regularly that which it is stated to be. It is a mere contract. *Rundle vs Murgatroyd*, 4 *Dall. Rep.* 305. If it is a marriage settlement it has not been legally executed agreeably to our laws, so as to operate upon the husband's real estate here. The widow, therefore, under that contract, is not entitled as a common creditor; but if she is to be considered as a creditor at all, she cannot be a preferred creditor; she may come in after all the debts are paid. *Prec. in Chan.* 539. *Underwood vs Hithcox*, 1 *Ves.* 279. *Anonymous*, 2 *Chan. Cas.* 17. *Emery vs Wase*, 5 *Ves.* 846. The contract is unreasonable, and ought not to be enforced. 2 *Pow. on Cont.* 221, 222.

*Mayer*, on the same side. This is an unreasonable settlement, and should not be enforced against creditors. It is a vague instrument, dealing in generals, and is not formally executed agreeably to our recording laws, so as to affect real estate. It is not tantamount to a grant of an interest. The 8th article of the marriage contract gives a bounty to the wife out of the husband's general estate, in preference to his disposing power. She does not take as a purchaser, but she takes it as a gift. The fund produced by the sale of the real estate ought not to be appropriated to pay this bounty in exclusion of the creditors. Real estate in this state is similar to personal in payment of debts. This contract is not better than a voluntary settlement, which a court of equity will set aside when to the prejudice of creditors. To make it a marriage settlement an estate must be

set apart to meet the claim which the wife is to take after her husband's death. *Garthshore vs Chalie*, 10 *Ves.* 1, 20. To entitle the appellant to recover she must show she had a grant of the specific property which has been sold under the decree in this case. There can be no such thing between husband and wife as debtor and creditor. The wife, to claim, must do so as purchaser. *Rundle vs Murgatroyd*, 4 *Dall. Rep.* 304. Where the husband receives the wife's funds, she cannot come upon his estate as a creditor. *Powell vs Hankey*, 2 *P. Wms.* 82. 1 *Bac. Ab.* 479. The eighth article of the contract looks to property to be thereafter settled on the wife in strict conformity to that contract. There being no settlement of any such property made, the covenant can have no effect. Suppose this land had been taken in execution during the life of the husband, what would have been the situation of the wife? She could not go into equity, because this land was not set apart to meet her claim. The contract is not to be regarded as an ante-nuptial settlement. It has none of the attributes of such a settlement; and not being so, the widow cannot be considered as a preferred creditor. It is a prodigal allowance which a court of equity will not sanction—there was not a sufficient pecuniary consideration upon which to found it. *Dewey vs Bayntum*, 6 *East*, 257. If the widow is entitled to dower, send her to a court of law to recover it. She has no equity under so unequal a settlement with reference to her merit or her fortune. The act of 1813, *ch.* 100, gives her no right to dower, because her right must have commenced, and be consummated at the death of her husband. On his death she was not a resident of this state, or of the *United States*, and therefore no dower interest vested in her. Under the act of March 1780, *ch.* 8, *French* subjects might hold lands in this state. Mrs. *Buchanan* then may hold lands during her life, but that holding commences with her residence; but not to give birth to any right antecedently acquired. The right must commence after her residence. This act is nothing more than the act of 1813, *ch.* 100. It must be a residence during the life of the husband. The treaty was to secure the right of inheritance only—such an interest as could be devised; and it is inapplicable to the question now before this court. Dower is not claimed upon independent grounds in opposition

to the husband. It is a peculiar estate; and the wife is in as of the estate of her husband. *Co. Litt.* 241. *a.* The widow is not to be assimilated to a plaintiff in ejectment, where an alien may recover against an individual.

*R. Johnson*, in reply, referred to *Chirac vs Chirac*, 2 *Wheat.* 259. *Kelly vs Harrison*, 2 *Johns. Cas.* 29. 1 *Bac. Ab.* 484.

*Curia adv. vult.*

ARCHER, J. at this term, delivered the opinion of the Court. The creditors of *William Buchanan* applied to the court of chancery for the sale of his real estate to pay his debts, his personal estate being insufficient for that purpose. A decree passed for its sale, and the proceeds were brought into the court of chancery for distribution. Mrs. *Buchanan*, his widow, to whom he was married in the *Isle of France* in the year 1803, applied by petition to the court of chancery to receive a dividend as a creditor, in virtue of certain marriage articles entered into between herself and her husband before their intermarriage in the *Isle of France;* and also claimed that a certain portion of the proceeds of sale should be allotted to her in lieu of her dower in the lands. Mrs. *Buchanan* was an alien, never naturalized, and continued to reside in a foreign country until the death of her husband. Both these pretensions have been rejected by the chancellor, and she seeks redress from his judgment by an appeal to this court.

Mrs. *Buchanan*, being an alien, is by the common law not entitled to dower in the lands whereof her husband died seized. An alien may purchase lands, and hold them against every one, (except the state,) until office found, or until the government shall exercise its authority over them. But an alien cannot inherit lands—the law, which never does any thing in vain, will not cast the inheritance upon one whom its policy forbids should hold it.

The widow cannot be considered as a purchaser, and, therefore, entitled to hold her dower until office found, but comes to her estate by operation of law, as does an heir by descent; and, therefore, cannot take it, and is in the same predicament as an

alien claiming to inherit. Either could take by act of the parties, as by purchase, but neither by operation of law.

The act of assembly of 1813, *ch.* 100, which authorises the endowments of aliens residing after their intermarriage in the *United States*, does not, it is believed, reach a claim situated as this is. Mrs. *Buchanan* never resided, as it is admitted, at any time during the coverture, in the *United States*, and without such residence she was not entitled to any benefit of the provisions of that law. The legislature contemplated a capacity to take dower at the instant of the husband's death, and did not mean that the estate, *which* should descend to the heirs at law, should be liable even for a season, at any distant period to be divested by the contingent removal and residence of the widow within the limits of the state.

It is not perceived what operation the treaties between the *United States* and the *French* government of 1778 and 1801, or the act of assembly of 1780, *ch.* 8, can have in giving effect to the claim of the appellant to dower. The *seventh* section of the last convention gave to *French* subjects power to dispose by donation, testament, or otherwise, of goods, moveable or immoveable, held in the territory of the *United States*, to such persons as they shall think proper; and by the same article the capacity to inherit is conferred on the citizens of the then *French* Republic. Thus was given the power to devise, and the capacity to inherit. It is doubtful whether by the most liberal construction, this clause in the treaty could be made to extend to a claim for dower; yet if extreme liberality were to give to its terms such a construction, yet it must be observed that the treaty expired by its own limitation in 1809, before the death of *William Buchanan*. If a right had vested under this treaty, there can be no doubt but that such right would be maintained notwithstanding the expiration of the treaty, and that it would have been equally valid as if the treaty had a perpetual duration. But Mrs. *Buchanan* had no vested right, it was altogether contingent, depending upon her surviving her husband, and her rights actually accruing before the treaty should expire. It had (if the treaty by any possibility could be considered as embracing it,) a mere inception and commencement, and was not perfected and complete until the death of

her husband, and until the treaty had expired, at which time her capacity to take her dower, with which she might have been clothed, during the existence of the treaty, ceased with the expiration of that convention.

The treaty of 1778, (which was followed by the act of 1780, *ch.* 8,) provided the subjects of the King of *France* should not be reputed aliens, and gave a disposing and inheritable capacity to them; but whatever might be considered the operation of this treaty, it was abrogated in 1798, long before any right to dower in the appellant could have had even an inception; and the act of 1780, *ch.* 8, (passed no doubt in part with the view of giving efficacy to the liberal principles of this treaty, and from a supposed necessity of some legislative act being necessary to give operation to it, being passed as it was under the confederation,) will be found not to be coextensive with the provisions of the treaty to which it refers, and to contain no enactment (considering it as a permanent law,) which reaches, or in any manner could affect the claim of the appellant.

From the above views it appearing that Mrs. *Buchanan's* alienage would preclude her from her enjoyment of dower, it is rendered unnecessary to examine the marriage articles for the purpose of ascertaining whether the covenants therein contained legally or equitably barred her of dower, nor shall we express an opinion upon that subject.

If the appellant is not entitled to dower, it is contended that she is entitled to be considered as a preferred creditor, to the extent of her claim, under the marriage articles, or, at all events, to be considered as having an equal right with the other creditors for a distributive share of the proceeds of sale.

It is not perceived upon what ground her pretensions to a preference can be rested. The articles cannot be viewed as a settlement, but must be considered merely in the light of a covenant or agreement made for the valuable consideration of marriage. To maintain this position no authorities need be cited; it may be sufficient to say that the marriage articles have no one legal attribute of a marriage settlement, so as to overreach the claims of creditors. But why should she not be considered in the light of a general creditor of her husband's estate, and although entitled to no preference, yet to an equal claim with the rest of

the creditors? The absence of a settlement has no bearing on the question. A legal obligation can be created without such settlement. A covenant or agreement before marriage, to pay her a given sum of money, could, after his decease, be enforced against the husband's representatives. Then why could not this agreement to pay her an annuity? It was made upon a consideration which was valuable, and one upon which the law always looks with a favourable eye. The mode stipulated by which it is to be raised ought not to affect her substantial rights under the agreement. The great object of the 8th article was to secure her the payment of an annual sum, and must be equivalent to an agreement or obligation for that purpose—the mode by which it was to be effected was to her immaterial. Had a settlement, after marriage, been made, grounded upon this ante-nuptial agreement, it would have been clearly sustainable against the claims of the creditors. *Rob. Fraud. Conv.* 218. And it is not perceived why a failure on the husband's part to comply with the agreement, can have the effect, not only of depriving the wife of a preference over other creditors, but of postponing her claim until they shall be entirely satisfied. The obligation to pay cannot be lessened by the neglect to set apart the fund from which the annuity might arise. If we ought not to look with peculiar beneficence upon her claim, it is surely entitled to equal regard and consideration with those of the creditors. Her pretensions are condemned by no fraudulent considerations, but are built upon the same moral foundation upon which those of the creditors rest.

Her right to come in with the general creditors having been determined, the extent of that claim is the next question for consideration. The 8th article of the marriage agreement, upon which it rests, is peculiarly worded; but we cannot doubt, upon a just construction of it, that she was to receive an annuity during life of $2000.

It would be difficult to resist the claim of Mrs. *Buchanan* to the payment of the annuity during the whole period of the marriage. We conceive that it commenced at the period of their union; for the parties covenant that there shall be no community of property, and the husband covenants to support the domestic establishment, and to maintain his wife and children

out of his own resources. Hence there could be no room to suppose or presume that this annuity was applied during coverture to the maintenance of the wife, as it might be if the husband had not explicitly bound himself to support her out of his own estate. We could not consider her maintenance as equivalent to the annuity, because it does not appear to be secured for such an object. Nor can we conceive that the circumstance of her never having demanded it during her coverture, could be considered as a waiver of her right, for she was under the legal control of her husband, and sufficient reason might spring from such a consideration for her failure to demand the annuity; but we are precluded, from the shape in which these proceedings are presented to the court, from making her a creditor on the estate for the amount of her accruing annuity during coverture, as it does not appear to have been claimed on her part, and she only seeks to be considered a creditor from the death of her husband.

The auditor has valued the life annuity, and added it to the arrearages claimed, for the purpose of ascertaining her debt; and, for the purpose of ascertaining the childrens' claim he has given them *in presenti*, a sum in lieu of what they are by the contract to receive at their mother's death. It must be observed, as an objection to this course, that the children by the agreement were not to have any thing until their mother's death; and the contract of the husband with the wife and children, will be both gratified by considering the capital of $40,000, from which was to arise the annuity, as a claim entitled to a dividend, equally with the other claims, which dividend should by the court of chancery be invested in some profitable stock, the accruing interest on which should be directed to be paid to the mother for life, and the principal at her death be distributed equally among the children. The auditor has calculated the arrearages of the annuity from the death of *W. Buchanan*, with the accruing interest to the day of sale. These arrearages properly constitute the debt due her, and when the amount shall have been ascertained she must, for such an amount, be considered a creditor, and entitled to a dividend. This dividend then, together with the interest which shall arise on the investment, which it has

been suggested should be made, will constitute her entire claim against the estate of her husband.—*Decreed*, that the order or decree of the court of chancery of the 4th of May 1825, so far as it rejected the claim of the appellant to be allowed any portion of the proceeds of the sale of the real estate of her husband, *William Buchanan*, be reversed, with costs to the appellant, both in this court and in the court of chancery. And this court proceeding to decree, as they are of opinion the chancellor should have done, do further *decree*, that the appellant is entitled to a dividend out of the amount of the proceeds of the sale of the said real estate, as a general creditor upon the said fund to the amount of the arrearages of the annuity due to her under the marriage contract between herself and her said husband, in the proceedings mentioned, together with the accruing interest on the said annuity from the time of the death of her said husband, to the time of the sale of his said real estate, as estimated and ascertained by the auditor of the court of chancery by his account in the proceedings accompanying his report of the 30th of November 1820. *Decreed* also, that over and above the said amount due to the appellant for the arrearages of the said annuity, and with a view to give her the full benefit of the said marriage contract, as far as may be, consistently with the rights of the other creditors of the estate of *William Buchanan*, and of the rights secured to the children of the said marriage, that the capital of $40,000 from which the annuity to the appellant, under the said marriage contract, was to arise, be considered as a claim entitled to a dividend equally with the other proper claims against the proceeds of the sale of the said real estate. *Decreed* also, that the amount of the said dividend upon the said sum of $40,000 be invested by the court of chancery, or under its direction, in some profitable stock, or in some good real securities, as in the discretion of the chancellor shall seem to him sufficient, and under all circumstances most to the interest of the appellant and her said children, to be selected by the court of chancery; and that the said court shall direct the whole of the interest or profits which may from time to time accrue upon the said stock or real securities as aforesaid, during her life, to be paid to the appellant, or her representatives; and that at her death, the

whole of said investment of the dividend of $40,000 be divided equally among the children of the marriage of the appellant, and the said *William Buchanan*, or their proper representatives. *Decreed* also, that the chancellor pass all such orders and decrees in the premises as may be necessary to carry this decree into effect.

DECREE REVERSED, &c.

## JOLLY'S Adm'rs. *vs.* THE BALTIMORE EQUITABLE SOCIETY FOR INSURING HOUSES FROM LOSS BY FIRE.—June, 1827.

The strictness and nicety which have been wisely adopted, in the trial of questions arising on policies of marine insurance, are not to their full extent applicable to the policies of a fire insurance association, formed for the individual accommodation and security of its members, the risks being assumed on the knowledge acquired by an actual examination made by the officers of the company, and not on the representations coming from the assured.

Such an association cannot be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary necessary acts of ownership over their houses, which have been usually exercised by the owners of such property; and, consequently, the insured is authorised to make any necessary repairs in the mode commonly pursued on such occasions; but if by gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured materially enhancing the risk, and not necessary to the enjoyment of the premises insured; or which, according to usage and custom, were not the result of the exercise of such ordinary acts of ownership, as in the understanding of the parties were conceded to the insured at the time of the insurance, and a loss by fire is thereby produced, then are the underwriters released from all liability to indemnify for such loss.

In the absence of any contract, or established rule of law, determining what repairs or alterations the insured was authorised to make, or whether if authorised, they were made in the usual way, the jury is the proper tribunal to decide those questions.

Alterations and additions to houses insured against fire, do not *per se* change the risk; they remain subject to the same perils, although their degree may be increased or diminished, and the jury is the proper tribunal to decide whether the risk has been increased.

APPEAL from *Baltimore* County Court. This was an action of *covenant* brought by the appellants against the appellees, the plaintiffs and defendants in the court below. The action was grounded on the policy of insurance hereinafter

mentioned. The defendants, (now appellees,) pleaded that they had not broken the covenant, &c. on which issue was joined.

At the trial the plaintiffs, (the appellants,) read in evidence the acts of 1794, *ch.* 39, granting a charter of incorporation to the defendants, and the act of 1801, *ch.* 35, a supplement to the said act of incorporation. They also offered in evidence the following policy of insurance, dated the 26th of December 1814: "*Baltimore* Equitable Society, (No. 4,106.) Whereas *William Jolly*, of *Baltimore*, in the State of *Maryland*, hath become a member of the *Baltimore Equitable Society, for insuring houses from loss by fire*, agreeably to the deed of settlement and act of incorporation thereof, passed by the legislature of *Maryland*, in the year of our Lord one thousand seven hundred and ninety-four, and hath paid and deposited in the hands of the treasurer of said society, nineteen dollars and thirty-three cents, the receipt whereof we do hereby acknowledge, being the full consideration for insuring him the sum of twelve hundred dollars, on the property hereinafter mentioned. Now be it known by this policy of insurance, that the said society do insure, and cause to be insured, against loss by fire, (on the terms and subject to the eventual deficiency of funds in the said deed of settlement mentioned and expressed,) the said *William Jolly*, his heirs, executors, administrators and assigns, in the sum of twelve hundred dollars, upon his brick dwelling-house, fronting on the south side of *New Church-street*, between *Charles-street* and *St. Paul's Lane*, twenty-four feet, and extending back twenty-one feet, being three stories in front, and two stories in the rear, finished in the plainest manner. This insurance to be and continue for the full term of seven years, from and after the date of these presents. And for the further security of the said insured, we, the directors of the said society, do hereby order and direct the treasurer thereof, for the time being, when and so often as the said house, or any house built in the room thereof, shall be demolished by fire, during the term of this insurance, to pay unto the said *William Jolly*, his heirs, executors, administrators or assigns, within three months after such demolition, out of the funds

of the society, the sum of twelve hundred dollars, and when and so often as the said house, or any house built in their room, or either of them, shall be damaged, injured or impaired by fire, during the said term, that the same be paid agreeably to the estimate thereof, not exceeding the sum of twelve hundred dollars, out of the funds of the society as aforesaid, or that the said buildings be repaired, and put in as good condition as they were before such damage accrued. And we do further order and direct the said treasurer, for the time being, at the expiration of this policy, to repay to the said *William Jolly*, his heirs, executors, administrators or assigns, nineteen dollars, thirty-three cents, the sum by him paid and deposited as aforesaid, together with his proportionable part of the profits of the business, (if any,) or so much of both or either of them as shall remain unappropriated, towards the payment of losses, and the necessary expenditures of the society; all which payments and repairs shall be made agreeably to the principles and provisions, and subject to the limitations and eventual deficiency of funds in the said deed of settlement mentioned and expressed. It is provided in the deed of settlement, and hereby declared, that if the said deposit money shall not be demanded at the office of the society, within one year after the expiration of this policy, that then the right of payment thereof shall cease, and the same remain sunk to the insured, for the benefit of the society. It is also provided in the deed of settlement, and is hereby declared and understood, that if the entire funds of the society should at any time be insufficient fully to pay and discharge all the losses incurred, that then and in such case a just average shall be made, and the payment to be demanded in virtue of this policy, in case of loss or damage by fire to the premises insured, shall be a dividend of the said funds in proportion to the sum insured, agreeably to the true intent and meaning of the said deed of settlement. If the premises insured in this policy are or shall be insured elsewhere, this policy to be void," &c. It was admitted that the said policy was duly executed, and that the insured was at the time the owner of the house in question. The plaintiffs also offered in evidence, that after the death of the insured, the plaintiffs, who are his administrators, duly appoint-

ed, took possession of the said house, and the same having become much dilapidated, they determined to give it a thorough repair, and in February 1820, engaged a workman to make the repairs; that while the said repairs were going on, in March 1820 the house was set on fire by an incendiary, and damaged in the floors, stair-cases, window frames and roof, to the value of $600; and that due notice was given to the defendants of the said loss, and a demand made in due form that they should repair the damages, or pay the sum insured, according to the policy; but the defendants refused to repair or pay the said sum, alleging that they were not liable to be charged with either, and have ever since refused to repair or pay the said sum insured, or any part thereof. The plaintiffs then gave in evidence, that no carpenters' or joiners' work was done in said house for any other purpose than for repairing the said house; that a work bench is considered by carpenters in the light of one of their tools, and that it was usual to do the whole or the chief part of the work at the house undergoing repairs, when those repairs were expected or intended to be considerable; and that the repairs made on this house as aforesaid were necessary for the purpose of rendering it tenantable. The plaintiffs further gave in evidence, that no repairs were ever made upon the aforesaid house after the fire damaged it, as before set out; but the same remained, until within four or five months since, in a ruinous state, without being tenanted or tenantable, when it was wholly pulled down; and that the ordinary rent of such a house so situated, if in good repair, was at least $150 *per annum*. It was admitted that the premises insured by the said policy were held in leasehold. The defendants then offered in evidence, that the repairs made by the plaintiffs to the house in question was a thorough repair, and made in the following manner—A plank floor was laid in the kitchen part of the basement story, which floor was of brick at the time the insurance in question was made, the old porch at the front door was taken down, and a new one of the same description put up; new stairs were made from the basement story, to the first floor, new doors were made for several of the rooms, and new window cases in some instances, put in, in the basement story. That in order to make these repairs all the materials were tak-

en to the house in question, in a rough state, and were there dressed and fashioned in the usual manner; a work bench and the necessary tools were carried to the house for the purpose of doing the work; that before the fire in question took place, the workmen had been engaged in making the repairs from four to six weeks; that during that time nobody lived in the house, and the chips and shavings and fragments of wood, produced by the work of the joiners or carpenters, were lying about the house, nor had it been occupied for some weeks previously thereto, the same having been suffered by the owners to be untenantable for want of repairs. That the materials were dressed and fashioned in a room on the first floor above the basement story, where the work bench was placed, and the floor of that room was covered with shavings and fragments of plank and seasoned wood, and that it was in this room the fire commenced. And the witness proved, that there was reason to believe that the fire which consumed the premises had been introduced through the broken window, among the shavings within, as the interior of the building was more accessible in that way than any other. The defendants then prayed the direction of the court to the jury, that if the jury should find the evidence as above stated in this exception to be true, then the plaintiffs were not entitled to recover. Which opinion and direction the Court, [*Archer*, Ch. J.] gave to the jury. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued at the last June term before BUCHANAN, Ch. J. and EARLE and DORSEY, J.

*Williams*, (District Attorney of *U. S.)* for the Appellants, contended,

1. That the repairs, which are described in the bill of exceptions as going on, in regard to the house insured, and the necessary occupancy thereof by the carpenter and his tools, were no violation of the terms of the policy of insurance, but were entirely consistent with the contract between the parties.

2. That the court below erred in giving an *absolute* direction to the jury that the plaintiffs were not entitled to recover, instead of leaving it to the jury to say by their verdict, whe-

ther the risk of the insurers was so enhanced by the repairs, that the defendants were not liable on the policy to indemnify the insured for the loss by fire, which happened to the premises.

On the *first* point, he referred to the act incorporating the appellees, 1794, *ch.* 39, *s.* 1, *Art.* 28, 32. 1 *Marsh.* 185, 200. *Taylor vs Curtis*, 3 *Serg. & Low.* 69.

On the *second* point, he cited 1 *Stark. Evid.* 409, 410, &c. 1 *Marsh.* 469, *(note,)* 470, *(and note,)* 473, *(note b.)* *Livingston vs Maryland Insurance Company*, 6 *Cranch*, 279. 1 *Phill. Evid.* 13, *(note,)* 128. *Hucks vs Thornton*, 3 *Serg. & Low.* 15. *Duff vs Budd*, 7 *Serg. & Low.* 399. *Laidlaw vs Organ*, 2 *Wheat.* 178. *Roach vs Pendergast*, 3 *Harr. & Johns.* 33. *Athey's Ex'x. vs Collins*, 7 *Harr. & Johns.* 213.

*Wirt*, (Attorney General of *U. S.)* and *Taney*, for the Appellees, on the *first* point, cited *Maryland Insurance Company vs Le Roy*, 7 *Cranch*, 26.

On the *second* point, they cited 1 *Stark. Evid.* 416, 417.

*Curia adv. vult.*

DORSEY, J. at the present term, delivered the opinion of the Court. The *Baltimore Equitable Society for Insuring Houses from loss by fire*, being a private association formed by owners of houses in the city of *Baltimore*, by which, collectively, they agree to contribute to the payment of all losses by fire, by them individually sustained, it appears reasonable that their policies should receive a fair and liberal construction, free from all captious technical exceptions.

The strictness and nicety which have been wisely adopted in the trial of questions arising on policies of *Marine Insurance* are not, to their full extent, applicable to the policies of this society. The former are entered into by the assurer almost exclusively on the statements and information given by the assured himself; in the latter case the insurers assume the risk on the knowledge acquired by an actual survey and examination made by themselves, not on representations coming from the insured. This association, therefore, formed for their individual accommodation and security, cannot, upon any sound principles of construction, be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary,

necessary acts of ownership over their houses, which have been usually exercised by the owners of such property. It hence follows, that the insured is authorised to make any necessary repairs in the mode commonly pursued on such occasions. But if, by the gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured materially enhancing the risk, and not necessary to the enjoyment of the premises insured, or according to usage and custom were not the result of the exercise of such ordinary acts of ownership, as in the understanding of the parties were conceded to the insured at the time of insurance, and a loss by fire is thereby produced; then are the underwriters released from all liability to indemnify for such loss. The policy of insurance here being perfectly silent on the subject, and no general principle or rule of law having been established, in cases like the present, by which to determine, whether the repairs or alterations were such as the insured had authority to make as being necessary to the user of the property; and whether, if authorised, they were made in the usual and customary way, the proper tribunal, to decide those questions, is the jury, and not the court.

It appears to have been conceded in argument, that ordinary, necessary repairs might be made by the insured; but not a thorough repair like the present. The proof of the appellants is "that the repairs made on this house were necessary for the purpose of rendering it tenantable," and that they were made in the usual way. The bill of exceptions shows, that by the word "repairs" both parties meant all that was done to the house. The distinction attempted to be taken has not been supported by any authorities, and in common sense and justice, there can be no discrimination between the right to make ordinary repairs, and such a thorough repair as is necessary for the purpose of rendering the house tenantable.

It has been stated by the counsel of both parties, that there can be found in the books no adjudication on a policy against fire analogous to the present. It becomes this court, then, maturely to deliberate before they sanction the doctrine contended for by the appellees, which, contrary to justice and the understanding and intention of the parties at the formation of

their contract, annihilates all claim to indemnity on the part of the insured, and yet leaves the insurer in the full enjoyment of the premium for responsibility. It perhaps scarcely ever happens, that during the period of seven years, the usual term to which such policies are limited, some trifling alteration or addition is not made to the property insured; as a new door or window opened, an additional closet, shelf, or such like fixture erected. Any of which acts, if the grounds assumed by the appellees are supported, change the identity of the property, create a new risk, and absolve the underwriters. Indeed, if alterations and additions are *per se* a change of the risk, it would follow, that the erection of a parapet wall in a city, a substitution of brick for a wooden floor, or a marble for a wooden mantlepiece, or the introduction of a coal-grate in a chimney constructed for wood as the only fuel, though lessening the peril would discharge the policy; as, according to the principles of maritime insurance, every *change of the* risk exonerates the underwriter, whether the danger be increased or diminished, or happen the loss from whatsoever cause it may. To infer, without any express provision or necessary implication arising out of the contract itself, or public policy demanding it, that the insured surrendered all right to make such common place, trivial, unimportant additions to, and alterations of his property, as its safety or his convenience or comfort might suggest, is a construction too rigorous to be rational. The effect of which would be to render worse than useless those most useful and indispensable institutions in populous cities—the Fire Insurance Companies, and give a fatal stab to our enterprising manufacturers. Who, if suing for a loss under a policy covering the manufactory and machinery, would be turned out of court without remedy or hope, if perchance the insurer could prove that the most immaterial alteration or improvement were made in his machinery by substituting the power of the screw for that of the lever, the leather strap for the iron wheel, or the iron for the wooden shaft. But suppose all the rules of marine insurance applicable to the question at bar, can a case be found in which it was ever contended that to add to the equipment of a vessel insured a yard more of canvass, or an additional cleet or clew line, was to vacate the insurance?

The numerous and warmly litigated questions of deviation and change of risk, which burthen the records of courts of justice, bear no analogy to that now under consideration. There, departing from the course of the voyage, or performing it at any other time than that required by the policy, subjects the vessel to different perils than those contemplated by the contracting parties; a flaw, a whirlpool, a breaker, may be encountered in one course of the voyage, which would be a cause of neither danger nor alarm at a mile's distance. The tempests or casualties attending the performance of a voyage to-day, bear no similitude or proportion to those attendant on a like voyage of to-morrow. But no such total revolution is wrought in the perils to a house insured against fire, which has undergone alterations or repairs; it remains subject to the same perils, although their degree may be increased or diminished. It becomes a question of *increase*, not of *change* of risk, for the ascertainment of which the jury, and not the court, is the proper tribunal.

The only authority which was strongly relied on by the appellees' counsel, and which was pressed as strictly analogous to the case before the court, was that of *The Maryland Insurance Company vs Le Roy, and others*, 7 *Cranch*, 26, which was considered as turning, not upon the common principle of deviation, but upon the ground of a forfeiture of the insurance by a change of the cargo insured. The suit there instituted was upon a policy on the *ship*, and the right to recover, therefore, could not be affected by any change in the cargo, unless the risk were increased, or it were a violation of an express warranty. The supreme court, in reversing the judgment of the circuit court, negative the idea that their decision was bottomed on an increase of risk, and furnish not the slightest pretext for placing it on the ground of an express warranty. It cannot, therefore, be viewed as determining any other than the familiar question of deviation; and although the reasoning of the court is not marked with that precision and perspicuity, which is usually displayed by the learned judge, by whom the opinion was pronounced, yet great reluctance would be felt in putting a different construction upon it, after an examination of

the authorities on the subject, the facts in the cause, and the grounds upon which the reversal was claimed. The ship was insured "at and from *New York*, to five ports on the coast of *Africa*, between *Castle D'Elmina* and *Cape Lopez*, including those ports, with liberty of touching and trading at all or any of said ports backwards and forwards, and at and from her last port on the coast to *New York*; with liberty of touching at the *Cape de Verds*, on her return passage, for stock, and to take in water." The declaration was for a total loss by the perils of the sea; and the bill of exceptions, among other facts, stated, "that the ship, in the prosecution of her voyage, arrived at the island of *Fogo*, one of the *Cape de Verd Islands*, on the 7th of May 1805, where the captain received on board four bullocks and four jack asses, besides water and other provisions, and unstowed the dry goods, and broke open two bales, and took out forty pieces of each for trade. That the ship remained there until the 24th of May. That the time generally employed by a vessel in taking in stock and water at the *Cape de Verd Islands*, is from two to three days, unless the weather should be very unfavourable; that the weather was good; and that the bullocks and jack asses encumbered the deck much more than small stock would have done." Upon these facts the court were prayed to instruct the jury, that the taking the jack asses on board the ship, while she lay at the *Island Fogo*, was not within the privilege allowed to the insured to touch at the *Cape de Verd Islands*, in the performance of the voyage insured, for the purchase of stock, and to take in water, and therefore vitiates the policy; which direction the court refused to give; but the court directed the jury, that the taking in the four jack asses at the island as aforesaid, did not avoid the policy unless the risk was thereby increased. To this direction an exception was taken; and Mr. *Pinkney*, in showing error, alleges "that the court refused to say that the taking in of the jack asses discharged the underwriters, although it might produce delay. It is not stated that it did not produce delay, and the evidence shows that it did. The principle of deviation is not increase of risk, but *delay*. If, therefore, here was any delay, the policy was void from that time." By thus arguing, that eminent lawyer ad-

mits that the policy was not vacated by the simple fact of taking the jack asses on board, but by the delay at the *Island of Fogo*, for which delay no other reason was assigned. Indeed, when we advert to the facts in the cause, that the ship remained fourteen days at *Fogo* without pretext or apology for so doing, it is difficult to imagine how a momentary doubt could exist on the question of deviation. And it is much more difficult to comprehend why an objection so obviously fatal to the claims of the insured, should, by the prayer of the underwriters, be so loosely and indistinctly presented for decision to the court below. That the supreme court, by whom it was decided, view this case as turning principally on the point on which it is here made to depend, is manifest from the review taken of it by Chief Justice *Marshall*, in *Hughes vs Union Ins. Co.* 3 *Wheat.* 166. He says, "the assured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be and certainly was varied." But admit that the interpretation which has been given by the appellees' counsel to the case of *The Maryland Ins. Co. vs Le Roy, and others*, be correct, and that the court there decided that the taking on board the jack asses, whether it caused delay or increased the risk or not, discharged the underwriters, this court should not follow a decision at war with reason, justice and public policy, which is bottomed on a *nisi prius* determination, long since acknowledged by its author to have been overruled; and which is inconsistent with numerous decisions of tribunals of the highest authority made after argument and due deliberation. Among which may be numbered the cases of *Raine vs Bell*, 9 *East*, 195. *Kane vs Columbian Ins. Co.* 2 *Johns. Rep.* 264. *Cormack vs Gladstone*, 11 *East*, 347. *Laroche vs Oswin*, 12 *East*, 131. *Kingston vs Girard*, 4 *Dallas*, 274; and *Hughes vs Union Ins. Co.* 3 *Wheat.* 159.

The case of *Stetson vs The Massachusetts Fire Ins. Co.* 4 *Mass. Rep.* 330, (not cited in the argument) though not containing the same facts, yet presented for decision a question, which in principle cannot be distinguished from that now before the court. In his proposals for insurance *Stetson* represents his house, (on which insurance was required,) as connected with other buildings on one side only; and such at the time was the

fact. Under the authority derived from the insured a frame building was subsequently erected and joined to the house insured, so that it became connected, in relation to other buildings, on two of its sides. It was afterwards consumed by fire, together with the building annexed to it. By one of the articles of the company (to the operation of which all persons contracting with them are subjected,) it is provided that the insurer may declare the policy null and void in all cases where the insured shall have repaired or enlarged a building, and thereby rendered the risk greater. The question submitted was in effect, whether the court could *ex natura rei* pronounce the erection of the frame building an increase of risk, or whether that fact were a matter to be found by a jury. The learned judge, by whom the opinion of the court was pronounced, states, "that the question may be examined upon general principles, and upon the terms of the contract." In considering it on general principles he states, that "if every the least alteration or enlargement of a building insured against fire is necessarily and of course material to the risk, and whenever it is made by the act or consent of the insured, is to vacate the policy, unless it should be renewed by the insurer, so close a restraint upon the party would place contracts of this kind in a state of complete uncertainty, and would render them so inconvenient as wholly to prevent them." That "the true reason why in a case of marine insurance, a deviation discharges the insurer, is not the increase of the risk, but that the party contracting has voluntarily substituted another voyage for that which was insured. This change of the voyage determines the contract from the time it happens. The same strictness is not requisite in an insurance against fire, where the building, although enlarged or repaired, remains the same: and it is only necessary to guard the insurer from an increase of risk, by an alteration of the building insured." He further states, that it is obvious that "an alteration may diminish and not increase the risk; and if this may be reasonably supposed in any case, then, whether the enlargement of a building insured has increased the risk of the insurer, is a question of fact to be determined by the jury."

It should not be forgotten, that there is no express stipulation restricting the insured as to the acts of ownership he may ex-

ercise over his property, or the repairs or alterations he may cause it to undergo. All restraints of this character, therefore, arise from necessary implication, founded on the presumed intentions and understanding of the parties; and are such as are called for by the dictates of reason, justice or public policy. Apply this doctrine to the case at bar, as exhibited in the appellants' proof, the truth of which must be conceded in granting the prayer of the appellees. All the work was done in the usual manner, and was necessary to render the house tenantable. The insurer, before he assumed the risk, viewed the property, examined its condition, considered all the casualties and incidents to which it might be liable, and, until the contrary is proved, is presumed to be as cognizant of these matters as the insured himself. Did he not know that the insured intended to derive benefit from the use and occupation of his house; that he contemplated keeping it in a tenantable condition? If so, does not reason, justice, and the understanding of the parties, revolt at the idea of an implication which should wrest from the insured the enjoyment of those important, invaluable rights, for the security of which, or an equivalent therefor, the very contract of insurance itself was effected? Nay, does not common sense, public policy, and fair dealing between man and man, demand that you should consider it as having been the intention of the parties, and as of the very essence of the contract, that the insured should exercise such acts of ownership over his property, as were necessary to keep it in tenantable condition?

This being a case in which the intervention of a jury was indispensably necessary to adjust the rights of the contending parties, the county court erred in granting the prayer of the appellees, that the appellants were not entitled to recover; for which their judgment should be reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## M'ELDERRY, *et al. vs.* FLANNAGAN'S Adm'r.—June, 1827.

The jury alone are competent to decide on facts of which contradictory evidence may be offered Before the court can legally give an instruction to the jury, on the prayer of one of the parties, they must admit the truth of the testimony offered by the other, and that also offered by the first, which may operate in his opponent's favour, and the existence of all material facts reasonably deducible therefrom, even though contradicted in every particular by the testimony of him who seeks the instruction. Upon no other principle can the case be withdrawn from the consideration of the jury.

Where the extent and limits of property leased are not exactly defined by the contract under which a tenant took possession, and in an action to recover the rent, the tenant relied upon an eviction of part of the demised premises by a third person claiming under his landlord, as bar to its payment, the jury should look to all the facts in evidence, and from them determine the limits of the tenant's lease, and whether there was an eviction or not.

Where a landlord having leased property to one tenant, subsequently leases a part of the same to another, the first is under no obligation to resist the second by force in taking possession; and notice by the first to the second tenant, (after a distress levied by the landlord on the former,) that he should consider him his tenant, is nugatory and inoperative.

Joint property in the possession of one of the owners, may be seized and sold under a *fieri facias* against him only; and the purchaser's right would be complete to the extent of the interest of him against whom the execution issued, and he might hold accordingly.

Where F, a ship-carpenter, contracted with C to build him a sloop, for which C was to pay as the work advanced, and furnish all the materials and labour except what appertained to the ship-carpenter's work, the vessel being in F's possession, not entirely paid for, and nearly finished, was levied on by the landlord of the ship-yard as a distress for rent—*Held*, that F had an interest in the vessel to the extent of his carpenter's work *not then paid for*, liable to seizure and sale on process for the recovery of debts, or rent due by him.

One joint owner of a chattel cannot maintain replevin against another.

APPEAL from *Baltimore* County Court. Replevin by the appellee against the appellants for a sloop or vessel on the stocks, taken in a certain place called The *Ship Yard* of the plaintiff. The defendants avowed the taking, &c. for two years rent in arrear of the lands and tenements in which, &c. under a demise thereof made by the defendants to the plaintiff's intestate, on the 18th of August 1813, at the yearly rent of $600; and because $1200 were due for two years, &c. well avows the taking, &c. for and in the name of a distress for the said rent, &c. The plaintiff pleaded to the avowry—1. That the plaintiff's intes-

tate did not hold or enjoy the said place in which, &c. as tenant thereof to the avowants under the supposed demise thereof, &c. 2. That no part of the supposed rent was or is in arrear, &c. Issue tendered. 3. That the said place in which, &c. was parcel of a close which the plaintiff's intestate held as tenant to the avowants a long time before the time when the said distress was made; and that the avowants, a long time before the time at which the said distress was made, and before the time at which the supposed rent for which the said distress was and is pretended to have been made, or any part thereof, was supposed or pretended to be due, entered wrongfully into the said close, and put out the plaintiff's intestate from a great part thereof, &c. 4. That the plaintiff's intestate was a ship-carpenter, and that the said place, in which, &c. was occupied by him as a common and public ship-yard for the building and repairing of ships and other vessels; and that the said goods and chattels were the property of one *William Carman*, and were a certain sloop or vessel upon the stocks and unfinished, and at the time of the said distress was in the possession of the plaintiff's intestate in the said public ship-yard, in the ordinary course of his trade as a ship-carpenter, for the purpose of being built and finished, and for no other purpose, and that the plaintiff's intestate had no property therein except as bailee as aforesaid of the said *Carman*, &c. The defendants joined issues to the *first* and *second* pleas. To the *third* plea they replied, that they did not, before the time at which the distress was made, and before the time the said rent was due, enter wrongfully into the said close, and put out the plaintiff's intestate, &c. Issue joined. To the *fourth* plea they replied, that the said goods and chattels were not the property of *William Carman*, and the sloop or vessel was not, at the time of the distress, in the possession of the plaintiff's intestate, in his public ship-yard, in the ordinary course of his trade, &c. and and that he had property therein. Issue joined.

1. The avowants, at the trial, gave evidence, that in the year 1810, *William Flannagan*, the plaintiff's intestate, rented of *Thomas M'Elderry*, under whom the defendants claim, part of the property, for the rent of which the distress was laid in

this cause, at the rent of $500 per annum, and afterwards rented another part of said property at the additional rent of $200 per annum; and that the property thus rented extended from, &c. That afterwards *Flannagan* on the 18th of August 1811, rented by parol of the defendants the whole property from *A*, round to *N*, for five years, for $1200 per annum. That after *Flannagan* had enjoyed the same for somewhat more than one year, the avowants having received a proposition for the renting of the wharf from *I* to *M*, called upon *Flannagan* and asked him if he would give up a part of said wharf for a proper consideration, to enable them to make a lease in perpetuity to *Martin F. Maher;* that *Flannagan* in July 1813, agreed that the avowants should lease to *Martin F. Maher* a part of said property called the *New Wharf*, as described in the lease to them; and that he, *Flannagan*, should rent the residue in his possession at the rate of $600 per annum; and that *Flannagan* enjoyed the property from *A* to *I* for two years next after this 18th of August 1813, and until the time of the distress which was laid by the defendants. And the avowants further proved, that immediately upon said agreement the avowants executed the following lease to said *Maher*, dated the 29th of July 1813, for all that lot, piece or parcel of ground, situate, lying and being in the city of *Baltimore*, and contained within the following metes and bounds, courses and distances, to wit: Beginning, &c. To have and to hold, &c. for 99 years, at the yearly rent of $2125, with the usual covenants to pay the rent, and liberty to re-enter on nonpayment, &c. Which lease extends from *I* to *M;* and that *Flannagan* having some timber on said part so leased to *Maher*, he removed the same from off said lot when requested so to do; and that *Flannagan* was present and saw the improvements made by *Smith* and *Maher* on the whole of said lot, and never objected to the same. That *Maher* paid rent to the avowants for his part of said lot up to the time of laying the distress in this case, and was never forbidden so to do by *Flannagan*. And that after the said lease was made by the avowants to *Maher*, the front of which, from *I* to *M*, was lying on the navigable waters of the Basin of *Baltimore*, *Maher* applied to the port wardens of *Baltimore* for permission to drive the piles from *H* to *N*, which

permission was granted to him by said port wardens, and that said piles were not driven by the direction or authority of the avowants, or either of them; and that during all the holding of *Flannagan* there was a chained moveable floating log fixed with one end to *H*, and the other on the piles, long enough to permit vessels and timber to come to the wharf from *H* to *I*, this log serving as a door for that purpose, and that there never was a period during the whole of said renting by *Flannagan*, in which there was not ample room on the other part of said demised premises, at which he might land lumber or carry in vessels, those being the only two purposes for which said wharf was requisite. The avowants further gave in evidence, by one *Daniel Conn*, a competent witness, that after the two years rent became due, which are in controversy in this cause, he went with Mrs. *M'Elderry*, one of the avowants, and one of the lessors of *Flannagan*, to *Flannagan*, to require of him the payment of said two years rent. That they saw *Flannagan*, who objected to pay it, but that nothing was said about any other rent than that now in dispute. The plaintiff, in order to support the *third* issue on his part, gave in evidence, that *William Flannagan*, the original plaintiff in this cause, some time prior to the year 1810, held as tenant to *Thomas M'Elderry*, deceased, whose heirs at law the defendants are, at the annual rent of $500, a portion of the property known by the name of *M'Elderry's Wharf*, beginning for the water front of said portion of property at the point marked *A* upon the plot hereunto annexed, and running thence southerly to *B*, and thence round to *O*; that one *Ludwig Herring* occupied under the said *Thomas M'Elderry*, and as his tenant, about 80 feet front, or thereabouts, lying immediately north of the point *A*; and that one *Salisbury* occupied the lower end of the wharf; that at that time the wharf extended as far south as the line *H I R*; and that there was also an unfinished wharf projecting southwardly from the line *I R*, about 60 feet; that *Salisbury* occupied the whole lower end of the wharf, including the said unfinished wharf or projection, and the water right in front thereof, and of the line *H I*. That by a contract made between the said *Thomas M'Elderry* and *Flannagan*, sometime in 1810, the said *M'Elderry* demised to *Flannagan* the whole

of said wharf property, which had been rented both by *Flannagan* and *Salisbury*, at the annual rent of $700. That subsequent to the said last mentioned demise the wharf was extended to its present limits, as laid down upon the plot, southwardly from the termination of the old wharf to the point *M* and *N*. That after the said extension, the defendants, who had then succeeded to the property upon the death of *Thomas M'Elderry*, whose heirs at law they are, demised by parol, to *Flannagan*, the whole of said wharf property beginning at *A* round to *N*, at the annual rent of $1200 for five years, commencing on the 18th of August 1811. That on the 29th of July 1813, the defendants leased to *Job Smith*, and others, at the annual rent of $2125, all that part of the wharf which is south of the line *H I R*. That *Smith*, and others, entered and took possession of the part of the wharf so leased, and drove piles in the place indicated by the dotted curved line from *H* to *N*, to the utter destruction of that part of the wharf called the *South Cross Wharf;* that is to say, that part of the wharf from *H* to *I*. That the said piles, and the occupier of the west front wharf running southerly from *I* to *M* by the said last mentioned lessees, not only deprived *Flannagan* of the use of all that part of the property south of the line *H I R*, but rendered the south front wharf from *H* to *I* of no use or value to *Flannagan*. That the said south front wharf had previously been of great importance to *Flannagan*. That *Flannagan* was a ship-carpenter, and that the said south front wharf was, on account of its situation in relation to the part, particularly adapted for the purpose of heaving down vessels, and was employed by *Flannagan* for that purpose; one large brig was actually hove down at the said south front wharf. After the said lease from the defendants to *Smith*, and others, no vessel could be hove down at said south front wharf, as well on account of the driving of the piles aforesaid, as of the occupation of the west front wharf, running southwardly from *I*, by the said last mentioned lessees. The plaintiff further proved by *William Carman*, a witness sworn in the cause, that in the month of March 1813, the defendants leased to the witness 100 feet of ground for 99 years, renewable for ever, at the rate of five dollars per foot per annum, by deed dated the 8th of

March 1813, and which was executed by *Elizabeth*, *John* and *Thomas M'Elderry*, in virtue of an act of assembly appointing them trustees, &c. to *William Carman*, *James Mosher* and *Robert Carey Long*, in the proportion of one undivided half to *Carman*, one undivided fourth to *Mosher*, and the remaining undivided fourth to *Long*, &c. And that in pursuance of, and by authority of said lease, the witness entered into the said 100 feet of ground, and began to remove some lumber and timber belonging to *Flannagan* from off the same, and to dig the foundation for an office. That while so removing said timber and lumber, and digging said foundation, *Flannagan* came to witness and told him he was encroaching on the grounds leased to him, *Flannagan*, by the defendants. That witness replied that he did not know how that was; that he had a lease of the ground, and that he, *Flannagan*, would have to settle it with the defendants. That the witness proceeded to remove, and did remove the lumber of *Flannagan* from off the ground, and dug the foundation, and built a brick office thereon, and enclosed the whole of said 100 feet of ground by a fence. The plaintiff further proved, that 16 feet of the 100 feet leased by the defendants to *Carman*, (from which 16 feet *Carman* removed the lumber and on which he built the office as before stated,) was part of the ground originally leased by *Flannagan* from the defendants; and that *Carman* has continued to hold the said 16 feet under and by virtue of the authority of his lease aforesaid, ever since, and held the same as aforesaid during the time in which the rent in this case is alleged to have accrued. The avowants then proved, that about the time of the lease to *Carman*, he proceeded to erect a brick shop on said 16 feet, and proceeded to remove some of *Flannagan's* lumber which was lying thereon; that *Flannagan* came and at first objected to it, but that *Carman* told him he had leased of *M'Elderry*, and then proceeded to remove the lumber, *Flannagan* standing by and seeing its removal without making any further objections; and that *Flannagan* never did object afterwards to the erection of said office, until the quarrel arose in 1816, and he sent *Carman* notice that he should consider him his tenant. The plaintiff then moved the court to direct the jury, that if they shall

believe the lease from the defendants to *William Carman*, as given in evidence, included a part of the ground to which *Flannagan* was entitled under his lease from the defendants of the 18th of August 1811, and that *Carman*, by virtue of his lease, entered upon such part, and thereby excluded *Flannagan* from the possession thereof, without his consent and against his will, then such entry and exclusion suspended the legal right of the defendants to demand rent from *Flannagan* for the whole or any part of the property so leased to him, as long as *Flannagan* was deprived of the possession of that part so leased and occupied by *Carman*, and included in the lease from the defendants to *Flannagan* as aforesaid. Which opinion and direction the Court, [*Archer*, Ch. J.] gave. The avowants excepted.

2. The preceding evidence having been given, the avowants made the three following prayers to the court: 1st. If the jury should believe from the evidence, that on the 18th of August 1813, the date of the lease from the avowants to *Flannagan*, upon which was reserved the rent of $600, *Flannagan* knew that *Carman* claimed, and had taken possession of, under his lease from the avowants, of the 16 feet lying between the lines on the plot from *A* to, &c. that then they may presume that said 16 feet were not intended to be included in the lease aforesaid to *Flannagan*. Which direction the court refused to give; but informed the jury that they should look to all the facts in evidence, and from them determine the extent and limits of the lease to the plaintiff. 2d. If the jury believe from the evidence, that after *Carman* took possession of the 16 feet marked on the plot, *Flannagan* did not apply to the avowants in relation to said possession, but afterwards gave *Carman* notice to pay the rent of said 16 feet to him, *Flannagan*, that then *Flannagan* elected to take *Carman* as his tenant, and that his so doing prevents said possession from amounting to an eviction of *Flannagan* from the property held by him from the avowants. 3d. Upon all the evidence and pleadings in this cause, the avowants prayed the court to instruct the jury, that they are entitled to recover. Which direction the court refused to give. The avowants excepted.

3. The plaintiff, in order to support the *fourth* issue on his part, gave in evidence that *William Carman*, mentioned in the *fourth* plea of him the plaintiff, agreed with *William Flannagan*, the original plaintiff in this cause, that he, *Flannagan*, should build for him, *Carman*, a sloop, for which *Carman* was to pay as the work advanced. That *Flannagan* accordingly built a sloop for *Carman*, and that *Carman* paid to *Flannagan* money on account of the said sloop. That on the 27th of February 1816, the captain employed by *Carman* to command said sloop, commenced superintending the said sloop, and did actually superintend and work on board her, and that his wages commenced from that day, she then being upon the stocks. That the said sloop was intended to be launched upon the 1st of March 1816, about 12 o'clock at noon; that about 10 o'clock, A. M. on the said 1st of March, the defendants distrained the said sloop; that in the course of the day she was replevied, and was actually launched about 5 o'clock, P. M. of the same day. That previous to the distress, *Carman* had paid to *Flannagan*, for and on account of the said sloop, and in pursuance of the contract for building her, the sum of $1,450. That at the time of the distress the mast of the said sloop was in her, and she was as much rigged as she could be previous to launching. That the joiners' work was all done; that she was painted and varnished. That there was much blacksmiths' work done upon her. That *Flannagan* had nothing to do with the rigging, joiners' work, blacksmiths' work, painting or varnishing the said sloop; but that the same were to be paid for by *Carman*. That there were other workmanship and materials employed in and about the said sloop before the said distress, for which *Carman* had paid, or was responsible, and which were finished by persons other than *Flannagan*, and with which *Flannagan* had nothing to do. That *Carman* had paid, and was responsible for the sum of $710, and upwards, for the workmanship and materials furnished and employed in and about the said sloop, by persons other than *Flannagan*, and with which he, *Flannagan*, had nothing to do. That *Flannagan* was a ship-carpenter; and that the place where the distress was made was his ship-yard. The defendants, to support the said issue on their part, gave in evindence,

that there was due to *Flannagan*, on account of the said sloop, the sum of $333 66. That the contract between *Carman* and *Flannagan* was that *Flannagan* should furnish all the materials for his work on said vessel, and should finish the said sloop to a cleat. That the meaning of said contract, as understood by merchants and ship-carpenters, is that the whole of the ship-carpenter's work shall be done; that it is part of the ship-carpenter's work to launch the vessel, which is a difficult and dangerous operation, and until it is over, vessels are always considered at the risk of the builder. That said vessel was only measured, and her tonnage ascertained, after she was launched; and that said distress was levied whilst said vessel was on the stocks, and before the carpenter's certificate was given for her; and it is quite usual for captains of vessels to superintend the building and equipping of vessels whilst on the stocks. The defendants then prayed the court, that upon the foregoing evidence, the plaintiff was not entitled to recover. Which opinion the court refused to give. The avowants excepted. Verdict and judgment for the plaintiff; and the defendants (the avowants,) appealed to this court.

The cause was argued at the last June term before Buchanan, Ch. J. and Stephen, and Dorsey, J.

*R. Johnson*, for the Appellants, contended upon the *first* bill of exceptions, 1. That admitting *Carman*, under his lease of the 8th of March 1813, took possession of 16 feet of the whole ground originally leased by the appellants to *Flannagan*, such possession did not in law amount to an eviction of *Flannagan* by the appellants, of those 16 feet, so as to extinguish their right to the rent.

2. By the evidence, *Carman's* possession under his lease of the 8th of March 1813, of the 16 feet, was before the lease stated in the avowry from the appellants to *Flannagan* of the 18th of August 1813, and did not interfere with *Flannagan's* enjoyment under his last lease, of any part of the property embraced by it; and, therefore, did not operate to suspend or extinguish the appellants' right to the reserved rent.

3. Upon the *second* bill of exceptions he contended, that the notification by *Flannagan* to *Carman*, after the date of

*Carman's* lease from the appellants, operated to make *Carman* an under-tenant of *Flannagan*, and to prevent that lease from having the effect of evicting *Flannagan* from any part of the property leased to him by the appellants, so as to suspend the right of the appellants to demand, under the last lease, their rent from *Flannagan*. Upon the *first* and *third* prayers in this bill of exceptions, no question will be raised.

4. On the *third* bill of exceptions, he contended, that the form of this exception admits the lease stated in the avowry, and that the rent was due at the date of the distress, &c. 1. That as *Flannagan* continued in possession of the property distrained at the time of the distress, he had such an estate in the property as rendered it liable to distress. 2. That if he had not such an estate, it was because he had parted with his possession, in which event he had neither a general nor special property in the vessel distrained, and could not, therefore, as is the prayer in this exception, maintain this action for the vessel.

On the *first* and *second* points, he cited *Clayton vs Blakey*, 8 *T. R.* 3. The act of 1766, *ch.* 14. *Laidler vs Young's Lessee*, 2 *Harr. & Johns.* 69. 4 *Bac. Ab.* tit. *Leases*, &c. (S 3,) 212.

On the *fourth* point, he cited 3 *Blk. Com.* 7. *Zagary vs Furnell*, 2 *Campb.* 240. *M'Donald vs Hewett*, 15 *Johns. Rep.* 349. *Allegre vs Maryland Insurance Company*, 6 *Harr. & Johns.* 408. *Mucklow vs Mangles*, 1 *Taunt.* 318.

*Wirt*, (Attorney General of *U. S.*) *Meredith* and *Evans*, for the Appellee. Upon the *first* bill of exceptions they contended, that an eviction of part of the land demised suspended the whole rent. 3 *Bac. Ab.* tit. *Extinguishment*, (A) 105. 6 *Bac. Ab.* tit. *Rent*, 49. *Co. Litt.* 148. a. *Gilb. on Rents*, 178. *Eddowes vs Niell*, 4 *Dall. Rep.* 134. The entry of *Carman* was an eviction of *Flannagan;* and the act of *Carman* was the act of the appellants, his lessors. *Co. Litt.* 249, *(note.)* 217, *(note* 3.) *Freeman vs Barnes*, 1 *Vent.* 80. The lease to *Flannagan* was not a void contract under the statute of frauds, or the act of 1766, *ch.* 14. A parol lease from year to year for seven years, is not a lease for a year certain, but for seven years. *Rob. on Frauds*, 242, 243, *(note.)* *Legg vs*

*Strudwick*, 2 *Salk.* 414. *Birch vs Wright*, 1 *T. R.* 378, 381, per *Buller*, J. A new lease of a part is no surrender of an old lease. A surrender of part is no surrender of the whole. 6 *Com. Dig.* tit. *Surrender*, (I 2,) 320. *Rob. on Frauds*, 258, 259, 261. 4 *Bac. Ab.* tit. *Leases*, 217. 3 *Bac. Ab.* 105. It is not a new lease of any part. The avowry does not state what part was demised. The *first* and *second* issues were found for the plaintiff without any direction from the court to the jury. *Rob. on Frauds*, 244. *Doe vs Bell*, 6 *T. R.* 471. As to the apportionment of rent—*Co. Litt.* 148. *Com. Dig.* tit. *Suspension*, (E.)

On the *third* bill of exceptions. A landlord has a right to distrain any property on the premises, excepting that placed there for public convenience, and the benefit of trade and commerce. *Gilman vs Elton*, 7 *Serg. & Low.* 355 Here the property of sundry persons was taken as the property of one person. The vessel taken was the common property of different mechanics—if she was not the property wholly of *Carman.* He was responsible to the mechanics. Take him as having a joint property with *Flannagan*, the distress was improper. *Co. Litt.* 47. But the whole property in the vessel was in *Carman. Woods vs Russell*, 7 *Serg. & Low.* 310. A mere right of possession is sufficient to maintain replevin. *Smith vs Williamson*, 1 *Harr. & Johns.* 147.

*Taney*, in reply. Three questions arise under the *third* bill of exceptions on the fourth issue. 1. Was the right of property in the vessel in *Flannagan* or *Carman?* 2. If in *Carman*, was she liable to distress? 3. If not liable, had the plaintiff such a property in her as could support replevin?

1. The contract was for building the vessel. *Carman* had the right of action to claim the property, but the right continued to reside in *Flannagan.* A right under a contract, and a right of property, are two different things. If any thing is to be done to the thing contracted for, it is the right of the vendor, and not the right of the vendee. Until the vessel was launched she was the property of *Flannagan*—not as bailee. The risk was *Flannagan's* if the vessel was destroyed in launching, &c. *M'Donald vs Hewett*, 15 *Johns. Rep.* 349. *Woods vs Rus-*

*sell*, 7 *Serg. & Low.* 310. A person mixing his property with another's is to abide the consequences resulting therefrom. It cannot exempt the property from distress for rent.

2. The property was not privileged from distress. *Gilman vs Elton*, 7 *Serg. & Low.* 357.

3. The prayer in the *third* bill of exceptions went as to the *fourth* issue, and was intended to apply to that issue only, although it was general.

On the *first* bill of exceptions. The eviction is not under the lease to *Maher*, but under the lease to *Carman*. The other leases have nothing to do with the case. The lease to *Flannagan* commenced in August 1811. In July 1813, *Flannagan* agreed to the lease to *Maher*. The 16 feet were not then in his possession. The new lease by parol was in 1813, for a rent of $600 per annum. An eviction suspends the rent from the time of the eviction. By the Statute of Frauds all leases for more than three years were leases at will. (See the statute in 1 *Bac. Ab.* tit. *Agreement*, (C) 115.) If the lease is for five years, that would be a tenancy from year to year, so long as the parties agreed. This is the case in *England*. But our act of 1766, *ch.* 14, declares that leases for above seven years shall be recorded; but it left all leases for seven years, and under, as they stood before, and did not repeal the law as to such leases. The effect of a lease from year to year, is a lease for a single year. Looking back for several years they are united, and it is a continuing contract; but looking forward it is only a lease for a year. If a lease is for three years, and the term has expired, the lessor could not distrain at common law. *Rob. on Frauds*, 241. The eviction by *Carman* was on the 13th of March 1813. What was *Flannagan's* interest at that time? His right then expired in August 1813. The agreement between him and the appellants was a new lease after August 1813, so that no rent could be exacted which fell due in August 1813, because of the eviction. But that eviction could not operate upon the new lease, which commenced in August 1813, at the expiration of the former lease. When he was evicted he had no interest. He got a new interest under the new lease. *Rob. on Frauds*, 242, *(and note.)* Here it cannot be presumed that the 16 feet

were included in the new lease, because they had been leased to *Carman*. An agreement to continue must be the act of both parties. Under the new lease *Flannagan* never was in possession, nor was to be, of the 16 feet leased to *Carman*. The presumption of a continuing lease is where the whole property remains in the possession of the tenant. The lease to *Carman* for the 16 feet was notice to *Flannagan*. Acceptance of a new lease for a part, is a surrender of the old lease as to all except that part. 4 *Bac. Ab.* 212, 217.

*Curia adv. vult.*

Dorsey, J. at this term, delivered the opinion of the court. The correctness of the opinion given by the county court on the *first* bill of exceptions, depends entirely on the existence of a fact, of which, to view it in the aspect most favourable to the appellee, there is considerable doubt. By the demise of the 18th of August 1811, *Flannagan* held of the appellants, by parol, for five years, the whole of the wharf property alluded to in any part of the proceedings in this cause. On the 8th of March 1813, the appellants leased to *William Carman* a part of it fronting 100 feet on the water; and on the 29th of the succeeding July, by the consent of *Flannagan*, made a lease of that part of said wharf called *The New Wharf*, to *Martin F. Maher*, for 99 years renewable forever; and according to the testimony of the appellants, as stated in this bill of exceptions, he, *Flannagan*, agreed to rent the residue of said wharf *in his possession*, at the rate of $600 per annum. Whether, in the opinion of the court, according to the weight of testimony, this contract of July 1813, is to be considered as a surrender of all those parts of the wharf only which were leased to *Maher*, and an apportionment of the rent for the residue, or as a surrender of the whole wharf, and an acceptance by *Flannagan* of a new lease of all that part of the wharf not included in *Maher's* lease, is wholly immaterial in deciding on the prayer made to the county court. Before the court could legally give the instruction prayed for by the appellee, they must admit the truth of the testimony offered by the appellants, and of the testimony given by the appellee, which may operate in the appellants' favour, and the existence of all material facts

reasonably deducible therefrom, even though contradicted in every particular by the testimony on the part of the appellee. Upon no other principle can the case be withdrawn from the consideration of the jury, who alone are competent to decide on facts of which contradictory evidence may be offered. The agreement of the 29th of July 1813, as proved by the appellants, is therefore a *concessum* in the cause. If there were no proof to show that the possession of *Carman's* lot was out of *Flannagan* at the time of that agreement, then were the court below justified in the opinion they have given. But if there be evidence from which a rational mind could infer such a fact, the county court have invaded the province of the jury, and their judgment must be reversed. The proof on the part of the appellee, is that *Carman*, in pursuance of his lease, entered upon his 100 feet of ground, erected a shop on 16 feet thereof, and enclosed the whole with a fence. The appellants prove that this was done about the time of the lease to *Carman*. When this testimony is coupled with the agreement of the 29th of July 1813, in which the word *possession* is used, for no other purpose that is discernible, unless it be to exclude from the demise to *Flannagan* the lot leased to *Carman*, can it be said that there is no evidence admissible to the jury to show possession in *Carman* at the time of such agreement? He who would refer to the case of *Ludlow vs Ogdon*, 2 *Wheat.* 178, (which however it must be admitted extends the power of a jury to the utmost verge of rationality,) would not hesitate in returning a negative answer to this question.

The *second* bill of exceptions presents *three* separate prayers on the part of the appellants, all of which were refused by the court. In the decision on the *first* and *third*, the counsel of the appellee have stated their entire acquiescence; and of that made on the *second* there is as little cause of complaint. Whether there was an eviction or not depends upon all the circumstances of the case, and not upon the two isolated facts which have been selected as the basis of the prayer. *Flannagan* was not bound to resist by force the acts of *Carman* in taking possession of the lot demised to him, and his notifying *Carman*, after the distress was levied, that he should consider him his tenant, did not make him so, or release him from his

covenants to the appellants; and upon no principle of law or justice should an act so nugatory and inoperative be construed to divest *Flannagan* of an unquestionable legal right.

The only question designed to be raised by the *third* bill of exceptions is, whether *Flannagan* had such an interest in the sloop, as could be the subject of a distress for rent. By the refusal to give the instruction demanded by the appellants, the court below have determined, that such a distress was unlawful; and from this decision an appeal has been wisely taken. Even let it be conceded that all the materials and work of the blacksmith, the ship-joiner, the painter and rigger, were the general property of *Carman*, and that he had a like interest in the materials and workmanship of the carpenter to the extent of his payments made on the sloop, and also that the ship-yard of *Flannagan*, for reasons of public policy, and for the encouragement of commerce, protects from distress the property of third persons, placed there in the ordinary course of business; yet is it not a proposition equally undeniable, that *Flannagan* had the same property in his materials and labour on the sloop, to the extent of the balance due to him therefor? The privileges of his ship-yard cast around his interest no protection, and it remained liable to distress in the same manner that his separate property would have been. Joint property, in the possession of one of the owners, may be seized and sold under a *fieri facias* against him only, and the purchaser's right would be complete to the extent of the interest of him against whom the execution issued; and he might hold possession accordingly. In the present case, if under the Stat. of 17 *Car.* II, *ch.* 7, the jury be required by the appellants to ascertain the amount of property distrained, they must have limited its value to the balance due from *Carman* to *Flannagan;* and if declining to proceed under this statute, a general judgment for a return had been rendered, *Carman,* by application to a court of equity, would have recovered the sloop, upon his paying to the purchaser the balance due for it according to his contract.

*Flannagan's* interest being adjudged distrainable, his right to maintain replevin as the bailee of *Carman,* so much relied on in the argument, necessarily falls to the ground—one joint owner of a chattel being incompetent to maintain replevin

against another. And upon no principle can the rights of the bailee, in such a case, be extended beyond those of his principal.

The case of *Woods vs Russell*, 5 *Barn. & Ald.* 942, urged by the appellee's counsel as conclusive upon the case before us, is clearly distinguishable from it. Here no act was done by *Flannagan* which could be tortured into an admission that the entire property in the sloop should pass to *Flannagan*, but upon the payment of the whole price stipulated to be paid for her. There the ship-builder was privy to the chartering of the ship by him for whom she was built, assented to the measurement thereof, and gave the usual certificate of building, &c. to authorise the granting to him a register, which issued accordingly, and could only have been obtained by making an affidavit of ownership. These facts create an irresistible implication, that the builder consented that the general property in the ship should be considered from that time as being in the defendant. And in that light were they viewed by the court.

The rights of the party, for whom any article is built agreeably to contract, is very strongly marked out in *Mucklow vs Mangles*, 1 *Taunt.* 318. *Royland* contracted to build a barge for *Pocock*, and received from time to time, as the work proceeded, £190, the value of the barge. When it was nearly completed, *Pocock's* name was painted on the stern. *Royland* became bankrupt before its completion. The court held that the barge was not the property of *Pocock* until finished; that it was a quite different thing from a contract of sale. And *Lawrence*, Justice, stated that no property vested, till the thing is finished and delivered. Such a general rule, though applicable to the case in which it was pronounced, would be productive of much inconvenience, and great injustice, if applied to the facts before us. There the contract was simply to build the barge. No agreement to pay the stipulated price as the work proceeded—nothing to specify the particular barge to which the contract or money paid should attach—nothing by which its identity could be ascertained. The delivery of any other barge would have been strictly a compliance with the contract. Not so here; the sloop was to be

paid for "as the work advanced," all the materials and labour, except what appertained to the ship-carpenter's work, were to be furnished and paid for by *Carman*. The contract, therefore, attached on and identified that particular sloop; the delivery of no other would have been by *Flannagan* a performance of his contract. *Carman* had, therefore, at the time of the distress, a general property in the sloop equivalent to the money paid, and labour and materials by him found on account thereof, but no further. The residue of the property therein remained in *Flannagan*, liable to seizure and sale, on process for the recovery of debts or rent due by him; and by no proceeding in a court of law could *Carman* recover possession of the sloop until payment, or tender of payment, of the whole price specified by the terms of his contract.

The opinion given by the county court on the *second* bill of exceptions is assented to; but that delivered by them on the *first* and *third* bills of exceptions is dissented from.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED

## THE UNION BANK OF MARYLAND *vs.* RIDGELY.—June, 1827.

A plea of special *non est factum* is a general issue plea, and like other general issue pleas need not be pleaded before the rule day, but may be received when the cause is called up for trial.

When an amendment of the pleadings is made at the trial under the act of 1809, *ch.* 153, *s.* 1, time is to be given during the term, to the adverse party to prepare to support his case; yet the cause is not, therefore, to be continued, unless the court shall be satisfied that a continuance is necessary.

Whatever apparent inconsistency there may be between the pleas of general performance and *non est factum*, it is the settled practice under the statute, 4 *Ann*, *ch.* 16, to receive them; for defendants are not confined to pleas strictly consistent.

The only pleas now disallowed on the mere ground of inconsistency are the general issue and tender, and the reason is, that one goes to deny the existence of any, while the other admits some cause of action.

The discretion vested in the courts by the act of 1809, *ch.* 153, to order and allow amendments to be made in all proceedings whatever, before verdict, so as to bring the merits of the question between the parties fairly to trial, is not a capricious but a sound legal discretion; to the proper exercise of which the party claiming it is entitled, and from which, he cannot properly be debarred by any rule, that is the mere creature of the court.

It is a general rule of evidence that in a suit brought by a bank, one who is a stockholder and interested in the event of the suit is not a competent witness in behalf of the institution, but that rule is not without exception—as where an interested corporator is called upon to prove himself either to be or to have been the depository of the muniments of his corporation.

An interested corporator, however, is not a competent witness to prove, that a book continued to be one of the muniments of his corporation after he had ceased to be the depository thereof.

The adoption of a code of by-laws by a corporation need not necessarily be by writing, but may be proved as well by the acts and uniform course of proceedings of such corporation, as by an entry or memorandum in writing.

Where a plaintiff in his replication sets out a code of by-laws of a corporation, which prescribe the duties of an officer of such corporation, and then assigns as a breach a violation of duties so prescribed, on which breach issue is tendered by the defendant and joined by the plaintiff, such by-laws are virtually admitted by the defendant in his pleadings.

It is a general principle of pleading, that where a plea produces a direct affirmative and negative by denying the allegation in the declaration, it should conclude to the country, whether the affirmative of the issue is held by the plaintiff or defendant; and that the proof of the affirmative rests on him who asserts it.

When new matter is introduced on either side, the pleading ought to conclude with a verification.

In the application of these rules, the plea of general *non est factum* in an action of debt on a bond, which by denying the allegation in the declaration, that it is the writing obligatory of the defendant, makes the issue between the parties, concludes to the country, and throws the whole proof of the execution of the bond, including the delivery, upon the plaintiff, who in that case asserts the affirmative.

Under an issue joined upon a plea of general *non est factum*, the defendant may give in evidence any thing which goes to show that the instrument of writing was originally void at common law—as lunacy, fraud, coverture, &c. or that it had become void subsequent to its execution—as by erasure, alterations, &c. for that plea puts in issue as well its continuance as a deed, as its execution.

A defendant may plead specially any matter which he might give in evidence under the plea of general *non est factum*; but if he chooses to do so, being new matter, he must do it with a verification, and holding the affirmative, he draws the burthen of proof upon himself.

If a defendant seeks to avoid a bond for duress, infancy, usury, &c. which cannot be given in evidence under the general issue, (the bond not being therefore void, but voidable,) he must plead such new special matter with a verification, and the proof lies upon him. In every such case the issue is upon the matter specially alleged in the plea.

The defendant may give in evidence, under the plea of general *non est factum*, that the instrument of writing was delivered as an *escrow* on a condition not performed; and it is settled he may plead it specially, and that

the proper conclusion to that plea is to the country; because it is a *special negative* to the affirmative in the declaration—the allegation in the declaration that it is the writing obligatory of the defendant, including the allegation of the delivery of it as a deed; and it is this conclusion to the country, that raises the question, whether the proof is on the plaintiff or defendant.

Where the delivery of a deed as an *escrow* is pleaded, the issue is upon that special matter, which being alleged and relied upon by the defendant to show that is not his deed, the proof of that allegation rests upon him; and if there be no proof on the part of the defendant, the possession of the instrument by the plaintiff, is *prima facie* evidence of the delivery as a deed, and is sufficient to sustain the issue on his part.

If the delivery as an *escrow* be proved on the part of the defendant, as alleged in the plea, the proof of the performance of the condition lies upon the plaintiff, where the affirmative is with him.

And where the defendant pleaded that he signed the supposed writing obligatory at the request of H, and as his surety, and returned the same to H, to be by him submitted to the obligees, (a corporation,) for their approbation and acceptance; and if the same should be approved and accepted by them, that then the same was to be considered and delivered as the act and deed of the defendant; and that the same never was approved of by the said obligees by any act in their corporate capacity, and so it was not his deed; in the absence of all evidence on the part of the defendant, the possession and production of the instrument of writing by the obligees would be sufficient *prima facie* evidence of the delivery and acceptance, to entitle them to a verdict, on the issue joined on such a plea.

It seems to have been formerly held, that a corporation aggregate could only act by its common seal—could do nothing without deed; but that doctrine is now no where sanctioned as a universal proposition.

The acts of corporations may now be evidenced by writing without seal.

The assent and acts of corporations, like those of individuals, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence.

A corporation may be bound by the acts of its duly authorised agent, although such acts are not reduced to writing.

Where the charter of a bank required its cashier to give bond, with two or more sureties, to the satisfaction of the president and directors, a bond executed by the cashier, and others, as his sureties, reciting his appointment as cashier, was found deposited among the archives and valuable original papers and documents of the bank, in an iron chest in the banking house of the corporation, the cashier continued to act in that capacity for years after the date of the bond, without any re-appointment. In an action on such bond by the corporation—*Held*, that in the absence of all testimony respecting the execution of the bond, the jury ought to be permitted to infer that it was duly executed and delivered by the defendant, and accepted by the plaintiffs, which acceptance necessarily included the approbation of the board of directors, or their satisfaction with the sureties, and was not necessary to be in writing.

Where the pleadings in a cause put in issue the facts that certain false and deceptious entries were made in the books of a banking corporation by its clerks, with the connivance of the cashier, on proof that such books were kept by the clerks of such bank, and such entries were in their handwriting, the books are evidence to show what entries were in them, which can only be done by their production, and are proper to lay a foundation for other testimony to show fraud, malconduct, neglect, or violation of duty by such cashier.

Where by the charter of a bank the directors were to be chosen annually, and they "for the time being, have power to appoint a cashier, and such other officers under them, as may be necessary for executing the business of said corporation," a cashier so appointed is an officer of the corporation, the duration of whose office, in the absence of any express limitation, is limited only by the duration of the charter, subject to the removal of the incumbent by the directors, as occasion might require, and is not necessarily an annual officer.

In construing a bond the court must look to the intention of the parties at the time it was executed, and the contract must be expounded as the law was, when the contract was made.

Where an act of incorporation, under which a bond was taken to secure the good conduct of one of the officers of the corporation, was limited in its duration to a certain period, the bond must have the same limitation; because the parties, looking to that act, it would seem to be very clear that no responsibility was contemplated beyond the period of its specified existence. The extension of the charter beyond the period of its first limitation by legislative authority, does not enter into the contract, and cannot enlarge it.

The day laid in pleadings is frequently not material, as in trespass, where the injury charged may be proved to have been committed on a day before or after the time stated in the declaration; provided it appears to have been before the action was brought.

In assigning the breaches of the condition of a bond, which was taken and intended as a security for a limited period, the time of the commission of the breach, is so far material, that it must be laid to be within such period; and an allegation of a breach beyond that period, renders the whole assignment defective, and bad on demurrer, as it then appears on the record that the defendant is charged beyond his legal responsibility.

APPEAL from *Baltimore* County Court. This was an action of debt, brought by the appellants against the appellee, as one of the sureties in the following writing obligatory, to wit: "Know all men by these presents, that we, *Ralph Higginbothom*, *Robert Purviance*, *Daniel Delozier*, *Edward Johnson* and *Nicholas G. Ridgely*, are held and firmly bound unto the *President and Directors of the Union Bank of Maryland*, and their successors, in the just and full sum of fifty thousand dollars, to be paid to the said *President and Direc-*

*tors of the Union Bank of Maryland*, or their certain attorney, their successors or assigns: To which payment well and truly to be made and done, we bind ourselves, jointly and severally, our, and each of our executors, administrators and assigns, firmly by these presents: sealed with our seals, and dated this thirtieth day of March, in the year of our Lord, eighteen hundred and five. Whereas, the said *President and Directors of the Union Bank of Maryland* have taken and employed the said *Ralph Higginbothom* in the capacity of Cashier, and such other business as the said *President and Directors of the Union Bank of Maryland* shall think fit to employ him about. Now the condition of the above obligation is such, that if the above bound *Ralph Higginbothom* shall and do, from time to time, make and give to the *President and Directors of the Union Bank of Maryland*, and their successors, a just and true account in writing, and discharge himself of, for and from, and likewise pay and deliver unto the said *President and Directors of the Union Bank of Maryland*, and their successors, all such sum or sums of money, bills, notes, goods and things whatsoever, which he shall from time to time receive, discharge, or which shall come to his hands, charge or custody, of or belonging to the said *President and Directors of the Union Bank of Maryland*, or their successors, or of any other person or persons whatsoever, wherewith they, the said *President and Directors of the Union Bank of Maryland*, or their successors, shall be charged or chargeable; and shall in all things, well and truly perform the duties of Cashier, to the said *President and Directors of the Union Bank of Maryland;* and also, if the said *Ralph Higginbothom*, *Robert Purviance*, *Daniel Delozier*, *Edward Johnson* and *Nicholas G. Ridgely*, or either, or any of them, either or any of their heirs, executors, or administrators, shall and do make and give, or cause to be made and given, unto the said *President and Directors of the Union Bank of Maryland*, or their successors, full satisfaction and recompense of and for all such monies, bills, notes, goods, wares and effects, or other things whatsoever, of or belonging to the said *President and Directors of the Union Bank of Maryland*, or their successors, or of any other person or per-

sons wherewith they, the said *President and Directors of the Union Bank of Maryland*, or their successors, shall or may be charged or chargeable, which, at any time or times, shall appear to have been received or discharged by, or come to the hands, charge or custody of the said *Ralph Higginbothom*, and which he shall not duly account for, pay, deliver or discharge himself from, to the said *President and Directors of the Union Bank of Maryland*, and their successors, or which he shall be found, confessed or proved to be wasted, embezzled, misspent or otherwise made away with, or unjustly detained by the said *Ralph Higginbothom*, or by any other person or persons by or through his means, privity or procurement, then the above obligation to be void and of none effect, otherwise to be and remain in full force and virtue in law." Signed and sealed by the obligors. The defendant, (the appellee,) craved oyer of the bond, and pleaded.

*First Plea.* "That the plaintiffs ought not to have or maintain their aforesaid action thereof against him, the said *Nicholas*, because he says, that the said *Ralph Higginbothom*, in the condition of the said writing obligatory mentioned, from the time of the appointment of the said *Ralph*, as Cashier, by the said plaintiffs, and from the time of the making of the said writing obligatory, hitherto hath well and truly observed, performed, fulfilled and kept, all and singular the matters and things in the condition of the said writing obligatory mentioned and comprised, in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept; and hath from time to time made and given unto the said plaintiffs, a just and true account in writing, and hath discharged himself of, for and from, and hath likewise paid and delivered unto the said plaintiffs, all such sum or sums of money, bills, notes, goods and things whatsoever, which he, the said *Ralph*, did, from time to time, receive, discharge, or which came to his hands, charge or custody, of or belonging to the said plaintiffs, or of or belonging to any other person or persons whatsoever, wherewith the said plaintiffs should or might have been charged or chargeable; and also, that he, the said *Ralph*, hath, in all things, well and truly performed the duties of a cashier to the said plain-

tiffs, to wit, at the county aforesaid, and this the said *Nicholas* is ready to verify: wherefore he prays judgment if," &c.

*Second Plea.* "That the plaintiffs ought not to have or maintain their aforesaid action thereof against him, the said *Nicholas*, because he says, that by a certain act of the general assembly of this state, made and passed at a session of assembly, begun and held at the city of *Annapolis*, on the fifth day of November, in the year eighteen hundred and four, and ended the twentieth day of January, eighteen hundred and five, entitled, An act to incorporate the stockholders in the *Union Bank of Maryland*, the proprietors of shares in the said bank, as well as those who might thereafter become stockholders, their successors and assigns, were created and made a corporation and body politic, by the name and style of The *President and Directors of the Union Bank of Maryland;* and it was, amongst other things, enacted by the said act, that the same, that is to say, the said act, should continue in force until the expiration of the year eighteen hundred and fifteen, and until the end of the next session of assembly thereafter. And the said *Nicholas* further says, that at the time the said *Ralph Higginbothom*, in the said supposed writing obligatory mentioned, was appointed cashier of the said *Union Bank of Maryland*, by the directors thereof, and at the time of the making of the said writing obligatory, to wit, on the thirtieth day of March, in the year eighteen hundred and five, the said *President and Directors of the Union Bank of Maryland*, were acting under, and conformably to, the said act of assembly; and under and by virtue, and in pursuance of saidact, the said *Ralph Higginbothom* was appointed cashier as aforesaid, and that the said supposed writing obligatory was made and delivered to secure the faithful performance of the duties of cashier, and of the other acts and things therein mentioned, by the said *Ralph*, for and during, and until the expiration of the said act of incorporation or charter, and no longer, to wit, at the county aforesaid. And the said *Nicholas* further says, that the said *Ralph Higginbothom*, from the time he was so appointed cashier as aforesaid, and from the time of making of the said supposed writing obligatory, and from thence until the expiration of the year eighteen hundred and fifteen, and until the end

of the next session of assembly thereafter, to wit, until the sixth day of February, eighteen hundred and seventeen, hath well and truly observed, performed, fulfilled and kept, all and singular the matters and things in the condition of the said supposed writing obligatory mentioned and comprised, in all things therein contained, on his part and behalf to be observed, performed, fulfilled and kept; and hath from time to time, made and given unto the *President and Directors of the Union Bank of Maryland*, for the time being, a just and true account in writing, and hath discharged himself of, for and from, and hath likewise paid and delivered unto the *President and Directors of the Union Bank of Maryland*, for the time being, all such sum or sums of money, bills, notes, goods, and things whatsoever, which he, the said *Ralph* did, from time to time, receive, discharge, or which came to his hands, charge or custody, of or belonging to the *President and Directors of the Union Bank of Maryland*, for the time being, or of or belonging to any other person or persons whatsoever, wherewith the said *President and Directors of the Union Bank of Maryland*, for the time being, or their successors, should or might have been charged or chargeable; and also, that he, the said *Ralph*, hath, in all things, well and truly performed the duties of a cashier to the *President and Directors of the Union Bank of Maryland*, for the time being, to wit, at the county aforesaid; and this the said *Nicholas* is ready to verify: Wherefore he prays judgment if," &c.

*Third Plea.* "That the plaintiffs ought not to have or maintain their aforesaid action thereof against him, the said *Nicholas*, because he says, that the act of assembly incorporating the said *President and Directors* by its original limitation, would have expired long before the commencement of the said action, to wit, on the sixth day of February, in the year eighteen hundred and seventeen, and that the said act was continued and extended by an act of assembly, passed at December session, eighteen hundred and fifteen, entitled, An act declaring the continuation and extension of the charters of the several banks therein mentioned, upon condition that the said *President and Directors* fulfilled and complied with the terms and conditions of the act of assembly, passed at December session, eighteen hun-

dred and thirteen, entitled, A supplement to the act, entitled, An act to incorporate a company to make a turnpike road leading to *Cumberland*, and for the extension of the charters of the several banks in the city of *Baltimore*, and for other purposes. And the said *Nicholas* in fact says, that the said *President and Directors* have not fulfilled and complied with the terms and provisions of the said last act; because the said *President and Directors* have not subscribed for as much stock in the company incorporated by the said act, as by the second section of the said act, the said *President and Directors* were directed and ordered to subscribe for; and because the said *President and Directors*, though directed and ordained by the seventh section of the said act so to do, have not paid annually on the first day of January, after the first day of January, eighteen hundred and fifteen, the sum of twenty cents upon every hundred dollars of the capital stock of the said *President and Directors*, which was and has been actually paid into the treasury of the western shore of the *state of Maryland*, but, on the contrary, the said *President and Directors* have neglected to pay the same, as well when the same became payable, as for the space of six months thereafter, to wit, at the county aforesaid. By means whereof, and long before the commencement of the present action, to wit, on the fifth day of February, in the year eighteen hundred and seventeen, the charter of or the act incorporating the said *President and Directors*, became and was null and void, and of no force, and the said *President and Directors* ceased to have any right to have or maintain any action or suit whatever, to wit, at the county aforesaid; and this, the said *Nicholas* is ready to verify. Whereupon he prays judgment if," &c.

*Fourth Plea.* "That the plaintiffs, their action aforesaid thereof against him the said defendant, ought not to have or maintain, because he says, that it was the duty of a committee of the board of directors of the said bank, consisting of at least three of their number, to visit in rotation at least once in every three months during the time which said *Ralph* was cashier of the said *Union Bank*, the vaults in which the cash and other valuable effects belonging to or in the custody of the said bank, were deposited; and also, to make, or cause to be made in their

presence an inventory of the same, to be compared with the books, in order to ascertain their agreement therewith, and make a report to the board. And the said defendant avers, that a committee of the board of directors, consisting of at least three of their number, did not visit in rotation at least once in every three months, during the time which said *Ralph* was cashier of said *Union Bank*, the said vaults, nor did the said committee make, or cause to be made in their presence, an inventory of the said cash and other valuable effects to be compared with the books, in order to ascertain the agreement of the said cash and other valuable effects with the said books, nor did the said committee make a report to the board, but on the contrary thereof, the aforesaid matters and things, which it was the duty of said committee to have done, they wholly neglected and omitted to do, to wit, at the county aforesaid. And the said defendant further says, that any loss, damage or injury, which may have happened to, or been sustained by the said plaintiffs, has happened and been sustained by reason and on account of the said neglects and omissions of them the said plaintiffs; and this he is ready to verify; wherefore the said defendant prays judgment if," &c.

*Fifth Plea*. "That the plaintiffs ought not to have or maintain their aforesaid action thereof against him, because he says, that by a certain act of the general assembly of this state, made and passed at a session of assembly, begun and held at the city of *Annapolis*, on the fifth day of November, in the year one thousand eight hundred and four, entitled, An act to incorporate the stockholders in the *Union Bank of Maryland*, the proprietors of shares in the said bank, as well as those who might thereafter become stockholders, their successors and assigns, were created and made a body politic and corporate, by the name and style of *The President and Directors of the Union Bank of Maryland*, and it was amongst other things enacted by the tenth section of the said act, that certain rules, restrictions, limitations and provisions, should form and be fundamental articles of the constitution of the said corporation. And the said *Nicholas* further saith, that by the second of said fundamental articles of the said constitution, it is, amongst other things, provided, that no director, having served for three

years successively, shall be eligible for the two succeeding years thereafter. And the said *Nicholas* further saith, that at the time the said *Ralph Higginbothom*, in the said supposed writing obligatory mentioned, was appointed cashier of the said *Union Bank*, by the directors thereof, and at the time of the making the said supposed writing obligatory, to wit, on the twentieth day of March, in the year one thousand eight hundred and five, the said *President and Directors of the said Union Bank of Maryland*, were acting under and by virtue of the said act of assembly and conformably thereto. And the said *Nicholas* further saith, that afterwards, to wit, on the thirty-first day of December, one thousand eight hundred and six, at a session of the general assembly of this state, begun and held at the city of *Annapolis*, on the third day of November, in the said last year, an act was made and passed by the said general assembly, at the request and solicitation of the said *President and Directors of the Union Bank of Maryland*, and without the knowledge or consent of the said *Nicholas*, entitled, An act supplementary to an act, entitled, An act to incorporate the stockholders in the *Union Bank of Maryland;* by which said supplementary act it was enacted, that so much of the said second fundamental article of the constitution of the said bank, as rendered a director, after serving for three years successively, ineligible for the two succeeding years, should be, and was thereby repealed. And the said *Nicholas* further said, that the said *President and Directors* of the said bank, and the stockholders therein, assented to the said repeal of so much of the said second fundamental article, and have always, ever since, acted under and conformably to the said original act, as thus altered, and in part repealed, and that at an election of directors of the said bank, held on the first Monday in July, in the year one thousand eight hundred and eight, sundry persons who had been elected and served as directors of said bank, for three successive years previous to the said last mentioned day, were and have been, ever since, continually re-elected directors of said bank, and served as such. And the said *Nicholas* further saith, that the said *Ralph Higginbothom*, from the time of his appointment as cashier of said bank, and from the time of the making of the said supposed writing obligatory, and

from thence until the said first Monday in July, in the year last aforesaid, did, from time to time, make and give unto the said *President and Directors of the Union Bank of Maryland*, a just and true account in writing, and discharge himself, of, for and from, and did likewise pay and deliver to the *President and Directors of the Union Bank of Maryland*, for the time being, all such sum or sums of money, bills, notes, goods and things whatsoever, which he the said *Ralph* did, from time to time, receive, discharge, or that came to his hands, charge or custody, of or belonging to the said *President and Directors of the Union Bank of Maryland*, or of or belonging to any other person or persons whatsoever, wherewith the said *President and Directors of the Union Bank of Maryland*, for the time being, or their successors, were or might have been charged or chargeable; and also, that he, the said *Ralph* did, in all things, well and truly perform the duties of cashier to the said *President and Directors of the Union Bank of Maryland*, for the time being, to wit, at the county aforesaid; and this, the said *Nicholas* is ready to verify; wherefore he prays judgment if," &c. To these pleas the plaintiffs replied, viz.

*Replication to 1st plea.* "That they, by any thing by the defendant, in his *first* plea, by him above pleaded, ought not to be barred from having their said action thereof against him, because, protesting," &c. "For plea, nevertheless, by way of replication to the said plea, by the defendant, first above pleaded, the plaintiffs say, that at a session of the general assembly of *Maryland*, begun and held at the city of *Annapolis*, on the fifth day of November, in the year eighteen hundred and four, amongst others, a certain act of assembly was passed, entitled, An act to incorporate the stockholders in the *Union Bank of Maryland*, (1804, *ch.* 48,) which follows in these words, to wit:

*An Act to incorporate the Stockholders in the Union Bank of Maryland.*

[The following appear to be the only material parts of the act necessary to be noticed.]

1. WHEREAS the president and directors of the *Union Bank of Maryland*, on behalf of themselves and others, proprietors

of stock in the said bank, have petitioned this general assembly, setting forth, that sundry persons, by articles of voluntary association, have contracted and agreed, each with the other, to conduct and carry on the usual operations of the banking system, at the city of *Baltimore*, under the name and style of *The President and Directors of the Union Bank of Maryland*, and praying that an act may pass to incorporate the stockholders in the said bank; and the same being reasonable, Therefore,

II. *Be it enacted by the General Assembly of Maryland*, That the said bank shall be, and the same is hereby established at the city or precincts of *Baltimore*, at the discretion of the president and directors; and the capital stock of the said bank shall consist of three millions of dollars, money of the *United States*, divided into shares of one hundred dollars each; and that five thousand shares be reserved for the use and benefit of the state of *Maryland*, to be subscribed for by the said state, when desired by the legislature thereof.

VI. *And be it enacted*, That the *president and directors* of the said bank, to wit: *William Winchester*, President; *James A. Buchanan, Solomon Etting, David Winchester, Andrew Ellicott, jr., Luke Tiernan, Charles Ridgely*, of *Hampton, Solomon Birckhead, Thomas M'Elderry, Walter Dorsey, Henry Payson, Hezekiah Clagett, Isaac Tyson, Ebenezer Finley, Stewart Brown, John Hollins* and *Henry Schroeder*, shall continue to act as such, until the first Monday of July, eighteen hundred and five, and until a new election of directors shall take place.

VII. *And be it enacted*, That the affairs of the said company shall be conducted by a president and sixteen directors, together with such other directors as the state shall appoint, in the manner hereinafter directed, and that there shall be an election of sixteen directors, by ballot, on the first Monday in July next, and on the first Monday in July of each and every year thereafter, by the stockholders and proprietors of the capital stock of the said corporation, and by plurality of votes, at such place, and in such manner, as the president and directors for the time being shall appoint; and those who shall be chosen at any election, shall be capable of serving as directors, by virtue of

such choice, until the end and expiration of the first Monday of July next ensuing the time of such election, and no longer, unless in case of failure of election on the day appointed, and in that case, until such election takes place, and the said directors, at the first meeting after such election, shall choose a president. And in case it should happen that an election of directors should not be made upon the day, when, pursuant to this act, it ought to have been made, the said corporation shall not, for that cause, be deemed to be dissolved; but it shall be lawful, on any other day, within ten days thereafter, to hold and make an election in such manner as shall have been regulated by the laws and ordinances of the said corporation. And in case of the death, resignation, disqualification, or removal out of the state of a director, or his being appointed president of the bank, his place may be filled up by the directors, for the remainder of the year.

VIII. *And be it enacted*, That the directors for the time being shall have power to appoint a cashier, and such other officers and servants under them, as may be necessary for executing the business of the said corporation, and to allow them such compensation for their services respectively, as shall appear reasonable.

IX. *And be it enacted*, That the president and directors for the time being, may make all such rules, orders, by-laws and regulations, for the government of the said corporation, its officers and servants, as they, or a majority of them, from time to time shall think fit, not inconsistent with law or the provisions of this act, the same at pleasure to revise, alter and annul, and may use, employ and dispose of the funds, money and credit of the said bank, as they, or a majority of them, may deem expedient, subject, however, to the restrictions and limitations hereinafter mentioned.

X. *And be it enacted*, That the following rules, restrictions, limitations and provisions, shall form and be fundamental articles of the constitution of the said corporation, viz. &c.

2d. None but a stockholder, except in the case of director chosen by the state, being a citizen of the *United States*, shall be eligible as a director or president; and every president or director, as the case may be, shall cease to be a director or pre-

sident upon his ceasing to be a stockholder, and not more than eleven directors in office shall be eligible for the next succeeding year; and no director, having served for three years successively, shall be eligible for the two succeeding years thereafter.

7th. The president, each director, cashier or treasurer, before he enters upon the duties of his office, shall take the following oath, or affirmation, as the case may be: I ———, do swear, or affirm, that I will faithfully, impartially, diligently and honestly, execute the duties of ———, agreeably to the provisions of law, and the trust reposed in me, to the best of my skill and judgment.

9th. The president and eight directors, shall constitute a board for the transaction of business, but ordinary discounts may be done by the president and five directors; in case of sickness, or the necessary absence of the president, his place may be supplied by a director, who he, by writing under his hand, shall nominate for the purpose.

14th. Every cashier, or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the president and directors, in a sum not less than fifty thousand dollars, with condition for his good behaviour.

XI. *And be it enacted*, That this act shall continue in force until the expiration of the year eighteen hundred and fifteen, and until the end of the next session of assembly thereafter.

And the plaintiffs further say, that after the passage of the said act, and in pursuance thereof, and conformably thereto, the said *directors* for the time being, did constitute and appoint the said *Ralph* to be the cashier of the said *Union Bank of Maryland*, to wit, on the first day of March, in the year eighteen hundred and five, to wit, at the county aforesaid; and the plaintiffs further say, that in pursuance of, and in conformity to, the said act of assembly, the said *president and directors* for the time being, did afterwards, to wit, on the twentieth day of February, in the year eighteen hundred and five, make certain rules, by-laws and regulations, for the government of the said corporation, its officers and servants, to wit, at the county aforesaid; which said by-laws follow in these words:—

*The first code of By-Laws adopted by the Union Bank of Maryland, and which remained in force until the 4th of October* 1819, *when they were repealed, and those in the printed copy, adopted.*

BY-LAWS.

[The following appear to be the only parts of the by-laws material in this cause.]

Art. 1. The *President and Directors of the Union Bank of Maryland*, shall take charge of the cash belonging to the said bank, shall receive deposits, issue bills or notes, signed by the president and countersigned by the cashier, to any amount they may think necessary, not exceeding two millions of dollars; discount bills or notes, at the rate of interest charged by other banks in the city of *Baltimore*, and shall do and perform all such matters and things, as may be necessary for conducting and carrying on in a proper manner, the business of said bank; and during the first six months of the operation of this bank, no note or bill shall be discounted for any term exceeding sixty days.

Art. 2. *And be it ordained by the President and Directors of the Union Bank of Maryland*, That all and singular the resolutions and acts of the late commissioners and present directors until this time, be and are hereby confirmed, and held to be good and valid to all intents and purposes, as if the same had been made, and entered into at a regular meeting of the stockholders.

Art. 4. That the bank shall keep open for ordinary business from nine o'clock in the morning till three o'clock, P. M. every day except Sundays, Christmas day and the fourth day of July.

Art. 5. That all bills and notes offered for discount shall be delivered into the bank on such day or days in each week as the directors may hereafter appoint, and be laid before the directors on the next succeeding day, (together with a state of the funds of the bank, at least twice a week) on which day the discount shall be settled, and be drawn for accordingly, at any time after twelve o'clock, and the notes or bills, not discounted, shall be returned on demand.

Art. 6. That all discounts shall be made on personal security, with at least two responsible names, (the firm and all the

partners of a house being considered as one name only,) allowing three days grace on all notes and bills payable at the bank, and discount to be taken for the same.

Art. 7. That to entitle a note or bill to be discounted at this bank, the maker or acceptor thereof must usually reside in the city of *Baltimore* or precincts thereof; and notes made at a distance must have two responsible names residing in the city or precincts aforesaid

Art. 18. That it be the duty of the president to pay all possible attention to the operations of the bank; to take into his safe keeping (at the bank) the plates, paper moulds and bank paper; to superintend the printing at the bank of all bills or notes that may be printed; to keep a regular account of the bank paper, and of the quantity from time to time ordered for impression; to superintend the duty of all persons employed in the bank; to sign all bills and notes which may be issued; and should this bank be incorporated, the president is to have in his charge and custody, the seal of the corporation, and cause the same to be affixed to all such instruments and documents, as the board of directors shall order or authorize; and do all other matters and things that the law directs.

Art. 19. That it shall be the duty of the cashier to countersign at the bank, all bills or notes signed by the president; carefully to observe the conduct of the persons employed under him; daily to examine the settlement of the cash account of the bank; to count the money deposited in the vaults; to compare the amount thereof with the balance of the cash account that day, and in case of disagreement, to report the same to the directors as early as possible; for which purpose, if necessary, the president may call a special meeting.

Art. 22. That a committee of the board of directors, consisting of at least three of their number, shall, in rotation, visit the vaults in which the cash and other valuable effects are deposited, at least once in every three months, and make, or cause an inventory of the same to be made in their presence, to be compared with the books, in order to ascertain their agreement therewith, and make a report to the board; that on the door of the great vault, there shall be three locks, and that the president, cashier and first teller, shall each keep a key.

Art. 24. That a book shall be kept for the use of the board of directors, in which all discounted notes and bills shall be entered, in such manner as to discover at one view, on each discount day, the amount which any person is indebted to the bank, on such notes and bills, in the capacity of payer, and in the capacity of discounter severally.

Art. 26. That the president and directors of the bank aforesaid, be authorised and appointed, and they are hereby authorised and appointed, to make and adopt any further by-laws for the government of said bank, which they may think necessary and convenient, provided they are not contrary to the articles of association.

And the plaintiffs further say, that after the said act of assembly, and after the making of the said by-laws, to wit, on the thirtieth day of March, in the year eighteen hundred and five, the said *Ralph*, in pursuance of the said act of assembly, gave the bond in the declaration mentioned, with the condition therein contained, to wit, at the county aforesaid: And the plaintiffs further say, that the said *Ralph* continued to be cashier, and to act in the capacity of cashier of the *Union Bank of Maryland*, from the day last mentioned, until the twenty-fifth day of May, in the year eighteen hundred and nineteen, under and in pursuance of the said bond last mentioned, to wit, at the county aforesaid: And the plaintiffs further say, that at a session of the general assembly of *Maryland*, begun and held at the city of *Annapolis*, on the fourth day of December, in the year of our Lord, eighteen hundred and fifteen, and ending on the thirtieth day of January, in the year eighteen hundred and sixteen, among other things, a certain act of assembly was passed, entitled, An act declaring the continuation and extension of the charters of the several banks therein mentioned; which said act of assembly, (1815, *ch.* 167,) follows in these words, to wit:

*An Act declaring the continuation and extension of the Charters of the several Banks therein mentioned.*

WHEREAS the *President, Directors and Company, of the Bank of Baltimore;* the *President and Directors of the Union Bank of Maryland,* [and various other banks therein named,] have transmitted to the executive of this state, certi-

ficates of their determination to agree to and accept of the renewal of their charters, upon the terms and conditions prescribed by an act, entitled, A supplement to the act, entitled, An act to incorporate a company to make a turnpike road leading to *Cumberland*, and for the extension of the charters of the several banks in the city of *Baltimore*, and for other purposes, passed at December session, one thousand eight hundred and thirteen: therefore, *Be it enacted, by the General Assembly of Maryland*, That the charters of, or the several acts of assembly incorporating the above mentioned banks, be and the same hereby are continued and extended to the first day of January, one thousand eight hundred and thirty-five, and to the end of the session of the general assembly next thereafter; *Provided*, that nothing herein contained shall be construed to release the said banks from the compliance of the terms and conditions prescribed in the act of assembly, entitled, A supplement to the act, entitled, An act to incorporate a company to make a turnpike road leading to *Cumberland*, and for the extension of the charters of the several banks in the city of *Baltimore*, and for other purposes, passed at December session, eighteen hundred and thirteen, chapter one hundred and twenty-two.

1st. *Breach—Embezzlement.* "And the plaintiffs in fact say, that the said *Ralph*, not regarding his duty as cashier as aforesaid, but fraudulently intending and contriving to injure and deceive the plaintiffs, did, on various days and times, from the day of the date of the said writing obligatory until the twenty-seventh day of January, in the year eighteen hundred and sixteen, and from the said twenty-seventh day of January, in the year eighteen hundred and sixteen, until the sixth day of February, in the year eighteen hundred and seventeen, and from the said sixth day of February, in the year eighteen hundred and seventeen, until the twenty-fifth day of May, in the year eighteen hundred and nineteen, privately, fraudulently, and in violation of his duty as cashier as aforesaid, use, embezzle, take out, and otherwise make away with the funds, monies and promissory notes for the payment of money, commonly called bank notes, to a great amount, to wit, to the amount of fifty thousand dollars, at the county aforesaid, be-

longing the plaintiffs, and wherewith the plaintiffs were chargeable, and which came to his, the said *Ralph's* hands, charge and custody, as cashier as aforesaid, and the same did unjustly detain and convert to his own use, whereby the plaintiffs were greatly prejudiced and damaged, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid, and this they, the plaintiffs, are ready to verify."

The 2d. assignment of breaches was like the first, except that it charged them to have been committed "on various days and times, from the day of the date of the said writing obligatory, until the 27th of January 1816."

The 3d. assignment of breaches was like the first, except that it charged them to have been committed "on various days and times, from the day of the date of the said writing obligatory, until the 6th of February 1817."

The 4th. assignment of breaches was like the first, except that it charged them to have been committed "on various days and times, from the day of the date of the said writing obligatory, until the 25th of May 1819," without any other allegation of the time.

5th. *Breach—Unlawful discountings.* "And further breach by way of replication to the said plea by the defendant *first* above pleaded," &c. "the plaintiffs say, that the said *Ralph*, not regarding his duty as cashier as aforesaid, but fraudulently intending and contriving to injure and deceive the plaintiffs, did, on various days and times, from the day of the date of the said writing obligatory, until the twenty-seventh day of January, in the year eighteen hundred and sixteen, and from the twenty-seventh day of January, in the year eighteen hundred and sixteen, until the sixth day of February, in the year eighteen hundred and seventeen, and from the sixth day of February, in the year eighteen hundred and seventeen, until the twenty-fifth of May, in the year eighteen hundred and nineteen, privately, fraudulently, and in violation of his duty as cashier as aforesaid, use the funds and monies belonging to the plaintiffs, and wherewith the plaintiffs were chargeable, and which came to the hands, charge and custody, of the said *Ralph*, as cashier as aforesaid, in secretly and unlawfully discounting notes for divers persons, and in appropriating the profits of

such secret and unlawful discountings to his own use, to a great amount, to wit, to the amount of fifty thousand dollars, at the county aforesaid, whereby the plaintiffs were greatly prejudiced and damaged, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid; and this they, the plaintiffs, are ready to verify."

The 6th, 7th and 8th breaches, were assigned upon unlawful discountings as in the 5th breach, the time being laid as in the 2d, 3d and 4th assignments of breaches, and in that respect only differing from the 5th breach.

9th. *Breach—Conspiracy, &c. False Entries.* "And for assigning further breach by way of replication to the said plea by the defendant, first above pleaded, according," &c. "the plaintiffs say, that the said *Ralph* did, on various days and times, from the day of the date of the said writing obligatory, until the twenty-seventh day of January, in the year eighteen hundred and sixteen, and from the said twenty-seventh day of January, in the year eighteen hundred and sixteen, until the sixth day of February, in the year eighteen hundred and seventeen, and from the said sixth day of February, in the year eighteen hundred and seventeen, until the twenty-fifth of May, in the year eighteen hundred and nineteen, to wit, at the county aforesaid, falsely and fraudulently combine, collude and conspire, with a certain *Andrew Burt*, teller of the said bank, and a certain *Pierce L. Tunner*, book-keeper in the said bank, falsely and fraudulently, and in violation of his duty as cashier as aforesaid, to lend out and give out, and in pursuance thereof, did fraudulently lend out and give out large sums of money belonging to the plaintiffs, and others, wherewith the plaintiffs were chargeable, and which came to the hands, charge and custody of the said *Ralph*, as cashier as aforesaid, and which he has not yet duly accounted for, paid, delivered or discharged himself from; amounting in all to a large sum of money, to wit, to the sum of fifty thousand dollars, to divers persons, and wrongfully and fraudulently to appropriate, and then and there, in pursuance thereof, did fraudulently appropriate the funds and monies of the said bank to their own private purposes, whereby the funds and monies of the said bank were wasted, embezzled, misspent, and otherwise made way with, and un-

justly detained by the said *Ralph*, and by other persons through his means, privity and procurement, to a great amount, to wit, to the amount of fifty thousand dollars, at the county aforesaid. And the plaintiffs in fact say, that neither the said *Ralph*, nor the said *Robert Purviance*, nor the said *Daniel Delozier*, nor the said *Edward Johnson*, nor *Nicholas G. Ridgely*, nor either nor any of them, nor either nor any of their heirs, executors or administrators, has or have yet, either made or given, or caused to be made or given unto the plaintiffs, or their successors, full satisfaction and recompense of and for such monies and funds belonging to the plaintiffs, or to other persons, wherewith the plaintiffs are chargeable, so as aforesaid wasted, misspent, embezzled and otherwise made away with, and unjustly detained by the said *Ralph*, and by other persons through his means, privity or procurement, or any part thereof. And the plaintiffs further say, that the said *Ralph*, in order to conceal the said secret, and unlawful and fraudulent doings from the plaintiffs, at divers days and times after the date of the said writing obligatory, and while he continued cashier of said bank as aforesaid, made or caused, or knowingly permitted to be made, certain false and deceptious entries in the books of the said bank, in violation of his duty as aforesaid, whereby the plaintiffs were greatly damaged, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid; and this they, the plaintiffs, are ready to verify."

The 10th, 11th and 12th breaches, were assigned upon conspiracy with the clerks and false entries as in the 9th breach, the time being laid as in the 2d, 3d, and 4th assignments of breaches, and in that respect only, differing from the 9th breach.

13th. *Breach—Over Drafts.* "And for assigning further breach, by way of replication to the said plea, by the defendant first above pleaded, according to the form of the statute in such case made and provided, the plaintiffs say, that the said *Ralph*, not regarding his duty as cashier as aforesaid, but fraudulently intending and contriving to injure and deceive the plaintiffs, did, at divers days and times, from the day of the date of the said writing obligatory, until the twenty-seventh day of January, in the year eighteen hundred and sixteen, and from the twenty-seventh day of January, in the year eighteen

hundred and sixteen, until the sixth day of February, in the year eighteen hundred and seventeen, and from the said sixth day of February, in the year eighteen hundred and seventeen, until the twenty-fifth day of May, in the year eighteen hundred and nineteen, during which several times the said *Ralph* continued cashier of the said bank, frequently, and from time to time, wrongfully and unlawfully take out of said bank, divers sums of money, to wit, the sum of fifty thousand dollars, at the county aforesaid, by draughts and checks upon the said bank and otherwise, when he, the said *Ralph*, had not money deposited in the said bank, wherewith to pay the said draughts or checks, and that during the said time the said *Ralph* did not, from time to time, make and give unto the plaintiffs and their successors, a just and true account in writing of all such sum or sums of money, bills and notes, which did from time to time come into his hands, charge and custody, of and belonging to the plaintiffs, or their successors, or to other person or persons, wherewith they, the plaintiffs or their successors, stood chargeable, whereby the plaintiffs suffered great damage, to wit, to the value of fifty thousand dollars, at the county aforesaid; and this they are ready to verify."

The 14th, 15th and 16th breaches were assigned upon over draughts as in the 13th breach, the time being laid as in the 2d, 3d and 4th assignments of breaches, and in that respect only, differing from the 13th breach.

17th. *Breach—Embezzlement of a Check, 21st November*, 1818. "And for assigning further breach, according," &c. "by way of replication to the said first plea, by the defendant, above pleaded, the plaintiffs say, that the said *Ralph*, with a view to injure and defraud the plaintiffs, and in violation of his duty as cashier as aforesaid, did, on the twenty-first day of November, in the year eighteen hundred and eighteen, to wit, at the county aforesaid, take from the funds and monies of the said bank, the sum of eight thousand three hundred and thirty dollars, and fraudulently charged or caused the same to be charged to a certain *William Dandridge*, cashier of a certain bank, styled "*The Bank of Virginia*," which said sum of money was never forwarded to the said *William Dandridge*, or to any person for him, but by the said *Ralph* was fraudu-

lently and wrongfully appropriated to his own private use, the said *Ralph* having charged or caused the same to be charged to the said *William Dandridge* the better to conceal his fraudulent and wrongful purpose from the plaintiffs, in breach and in violation of his duty as aforesaid, and to the great prejudice and damage of the plaintiffs, to wit, to the value of ten thousand dollars, at the county aforesaid; and this they are ready to verify."

18th. *Breach—Another Embezzlement, 19th, March* 1818. "And for assigning further breach, according," &c. "by way of replication to the said first plea by the defendant above pleaded, the plaintiffs say, that the said *Ralph*, fraudulently and unlawfully intending to injure and deceive the plaintiffs, and in violation of his duty as cashier as aforesaid, did, on the nineteenth day of March, in the year eighteen hundred and eighteen, take from the funds and monies of the said bank, the sum of seven thousand five hundred and four dollars and eighty cents, and fraudulently and unjustly appropriated the same to his own private uses, which said sum of money the said *Ralph*, with a view to deceive and defraud the plaintiffs, did falsely charge or cause to be charged in the books of the said bank, as for a certain bill of exchange, alleged by him to have been bought by the plaintiffs of a certain *John Gooding*, and which the said *Ralph* pretended to have remitted to a certain *Thomas Williamson*, cashier of a certain bank in the borough of *Norfolk*, styled *"A Branch of the Bank of Virginia;"* which said bill of exchange, or pretended bill of exchange, the plaintiffs say, never was remitted to the said *Thomas Williamson*, but that the said *Ralph* falsely charged the same to the said *Thomas Williamson*, as a pretence to conceal the said fraudulent appropriation from the plaintiffs, in breach and violation of his duty as aforesaid, whereby the plaintiffs suffered great damage, to wit, to the value of ten thousand dollars, at the county aforesaid; and this they are ready to verify."

19th. *Breach—False Statements.* "And for assigning further breach, according," &c. "by way of replication, to the said plea by the defendant first above pleaded, the plaintiffs say, that the said *Ralph*, with a view to deceive and defraud the plaintiffs, and in violation of his duty as aforesaid, did, at vari-

ous days and times, from the day of the date of the said writing obligatory, until the twenty-seventh day of January, in the year eighteen hundred and sixteen, and from the said twenty-seventh day of January, in the year eighteen hundred and sixteen, until the sixth day of February, in the year eighteen hundred and seventeen, and from the said sixth day of February, in the year eighteen hundred and seventeen, until the twenty-fifth day of May, in the year eighteen hundred and nineteen, to wit, at the county aforesaid, knowingly make divers false statements of the condition of the said bank to the plaintiffs, frequently, wilfully and fraudulently charging or causing to be charged, divers individuals and banks, with large sums of money as due and owing to the plaintiffs, than the said individuals or banks in fact owed or were indebted to the plaintiffs, to wit, the sum of fifty thousand dollars, whereby the plaintiffs suffered great damage, to wit, to the value of fifty thousand dollars, at the county aforesaid; and this they are ready to verify."

The 20th, 21st and 22d breaches, were assigned upon false statements made of the condition of the bank, as in the 19th breach, the time being laid as in the 2d, 3d and 4th assignments of breaches, and in that respect only, differing from the 19th breach.

23d. *Breach—Negligence.* "And for assigning further breach by way of replication to the said plea by the defendant first above pleaded," &c. "the plaintiffs say, that the said *Ralph*, on various days and times since the day of the date of the said writing obligatory, and while it was in full force and virtue, and during the time the said *Ralph* was cashier as aforesaid, and before the commencement of this suit, did not carefully examine the conduct of the persons employed under him by the plaintiffs as it was his duty to have done, and as he was required by the said by-laws to have done, but to do so, omitted and neglected, by which said omission and neglect of the said *Ralph*, the plaintiffs were damaged to a great amount, to wit, to the amount of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify."

24th. *Breach—Omitted to count the money*, &c. "And for assigning further breach, according," &c. "by way of re-

plication to the said plea by the defendant first above pleaded, the plaintiffs say, that the said *Ralph*, in violation of his duty as cashier as aforesaid, at various days and times, since the date of the writing obligatory, and whilst the same was in full force and virtue, and during the time the said *Ralph* was employed by the plaintiffs as cashier as aforesaid, and before the commencement of this action, did not, when it was his duty to have done so, count the money deposited in the vaults of the said bank, and compare the amount thereof with the balance of the cash account of the said bank, in the manner he ought to have done, but omitted and neglected so to do, whereby large sums of money, to the amount of fifty thousand dollars, wherewith the plaintiffs were chargeable, and which were in the charge and custody of the said *Ralph* as cashier as aforesaid, where wholly lost, and the plaintiffs greatly prejudiced and damaged, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify."

25th. *Breach—Did not compare the books*, &c. "And for assigning further breach by way of replication to the said plea by the defendant first above pleaded, according," &c. "the plaintiffs say, that the said *Ralph*, in violation of his duty as cashier as aforesaid, at various times during the time he was cashier as aforesaid, and after the date of the said writing obligatory, and whilst the same continued in full force and virtue, and before the commencement of this action, altogether omitted and neglected to examine and compare the several books of account of the bank, which were kept by the clerks and subordinate agents of the said bank, under the superintendance and direction of the said *Ralph*, as cashier as aforesaid, as it was his duty to have done, whereby material errors, mistakes, false statements and disagreements arose and occurred therein, and large sums of money, wherewith the plaintiffs were chargeable, and which came to the hands, charge and custody of the said *Ralph* as cashier, were thereby wholly lost, to the amount of fifty thousand dollars, and the plaintiffs have thereby sustained damage to the value of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify."

26th. *Breach—Did not examine cash account.* "And for assigning further breach, by way of replication to the said plea,

by the defendant first above pleaded, according," &c. "the plaintiffs say, that the said *Ralph*, in violation of his duty as cashier as aforesaid, during the time he was employed by the plaintiffs as cashier as aforesaid, and after the date of the said writing obligatory, and when the same continued in full force and virtue, and before the commencement of this suit, did not daily examine the settlement of the cash account, as it was his duty to have done; but wholly neglected and omitted to do so, whereby the plaintiffs have sustained great damage, to the amount and value of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify."

27th. *Breach—Negligence in not reporting deficiencies.* "And for assigning further breach, by way of replication to the said plea, by the defendant first above pleaded, according to the form of the statute in such case made and provided, the plaintiffs say, that after the date of the said writing obligatory, and while the same was in full force and virtue, and during the time the said *Ralph* was employed by the plaintiffs, as cashier as aforesaid, and before the commencement of this suit, at various days and times, there were large and improper deficiencies of the money in the vaults of the said bank, which the said *Ralph* as cashier as aforesaid, ought to have reported to the directors of the said bank, but which, on the contrary, in violation of his duty as cashier as aforesaid, he wholly omitted and neglected to do, by which omission and neglect the plaintiffs have sustained great damage, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid; and this the plaintiffs are ready to verify."

28th. *Breach—Did not account, &c.* "And for assigning further breach, by way of replication to the said plea, by the defendant first above pleaded, according," &c. "the plaintiffs say, that the said *Ralph* since the date of the said writing obligatory, and while the same continued in full force and virtue, and during the time he was employed as cashier as aforesaid, and before the commencement of this suit, did not, from time to time, make and give unto the plaintiffs, a just and true account in writing of all such sums of money, as from time to time came to his hands, charge and custody, as cashier as aforesaid, wherewith the plaintiffs were chargeable, as it was his

duty to have done, but wholly omitted and neglected so to do, by which omissions and neglect, the plaintiffs have sustained great damage, to the amount and value of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify."

29th. *Breach—Received money, &c. Did not pay, &c.* "And for assigning further breach, according," &c. "by way of replication to the first plea by the defendant above pleaded, the plaintiffs say, that the said *Ralph*, since the date of the said writing obligatory, and while the same continued in full force and virtue, and during the time he was employed and acted as cashier as aforesaid, and before the commencement of this suit, did from time to time, receive into his charge and custody as cashier as aforesaid, divers large sums of money, bills and notes, to the amount and value of fifty thousand dollars, belonging to the plaintiffs, and wherewith they were chargeable, which the said *Ralph* has not since paid or delivered to the plaintiffs, or otherwise discharged himself from, as he ought to have done, but so to do, hath wholly omitted, neglected and refused; whereby the plaintiffs have susutained great damage, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify."

30*th. Breach—Combination to take money, &c.* "And for assigning further breach, by way of replication to the said plea, by the defendant first above pleaded, according," &c. "the plaintiffs say, that the said *Ralph*, since the date of the said writing obligatory, and while the same continued in full force and virtue, and during the time he was employed and acted as cashier as aforesaid, to wit, at the county aforesaid, did falsely and fraudulently combine, collude and conspire with a certain *Andrew Burt*, teller of the said bank, and a certain *Pierce L. Tanner*, book-keeper in the said bank, falsely and fraudulently, and in violation of his duty as cashier as aforesaid, to take out of the said bank, a certain sum of money, to wit, the sum of eight thousand dollars, which had been before that time deposited by, and belonging to a certain *Amos A. Williams*, and in pursuance thereof did fraudulently take out of the said bank, the said sum of money, to wit, the sum of eight thousand dollars, which had been before that time deposited as aforesaid, the

said sum of money being money wherewith the plaintiffs were chargeable, and which came to the hands, charge and custody of the said *Ralph* as cashier as aforesaid, and which he has not yet duly accounted for, paid, delivered or discharged himself from, whereby the plaintiffs were greatly damaged, to wit, to the value of fifty thousand dollars, to wit, at the county aforesaid; and this they are ready to verify: wherefore they pray judgment, and their debt aforesaid, together with the damages on occasion of the detention thereof, to be adjudged to them, &c."

*Replication to the second plea.* This replication assigned similar breaches to those assigned under the replication to the first plea.

The plaintiffs demurred generally to the defendant's *third*, *fourth*, and *fifth* pleas, to which there were joinders in demurrer.

The defendant demurred generally to the 1st, 4th, 5th, 8th, 9th, 12th, 13th, 16th, 17th, 18th, 19th and 22d breaches assigned in the replications to the *first* and *second* pleas, to which there were joinders in demurrer. To the other breaches, viz. the 2d, 3d, 6th, 7th, 10th, 11th, 14th, 15th, 20th, 21st, 23d, 24th, 25th, 26th, 27th, 28th, 29th and 30th, in the 1st and 2d replications of the plaintiffs to the 1st and 2d pleas, the defendant rejoined, denying the matter of each of the said breaches directly, concluding each rejoinder to the country, and on which issues of fact were joined

The cause was then, on the prayer of the parties to amend their pleading, continued for several terms, and at the term when the cause was tried, the defendant asked and obtained further leave to amend his pleadings. He then filed the following plea, in addition to those before filed, viz. *Sixth plea.* "And the said *Nicholas G. Ridgely*, by leave of the court here, according to the form of the statute in such case made and provided, comes and further defends the wrong and injury when, &c. and says that the said plaintiffs their action aforesaid thereof against him, the said *Nicholas*, ought not to have or maintain, because he says that on or about the thirtieth day of March, in the year of our Lord eighteen hundred and five, to wit, at the county aforesaid, the said supposed writing obligatory was presented

and shown by the said *Ralph* to the said *Nicholas*, and the said *Nicholas* was then and there requested by the said *Ralph* to join in the said supposed writing obligatory as co-security with other securities, for him, the said *Ralph;* and the said *Nicholas* assenting to such request of the said *Ralph*, did then and there sign and seal the said supposed writing obligatory, and returned the same to the said *Ralph*, to be by him submitted to the said *President and Directors of the Union Bank* (the plaintiffs in this cause) for their approbation and acceptance; and if the said supposed writing obligatory should be approved and accepted by the plaintiffs, that then and in such case the said supposed writing obligatory was to be considered and delivered as the act and deed of him, the said *Nicholas*, and not otherwise. And the said *Nicholas* avers, that the said supposed writing obligatory never was approved and accepted by the plaintiffs by any act in their corporate capacity; and so the said *Nicholas* says that the said supposed writing obligatory is not his act and deed; and of this he puts himself upon the country, and so forth." This plea was verified by the oath of the defendant. The plaintiffs joined in issue.

The county court rendered judgment for the defendant on the demurrers to the 1st, 4th, 5th, 8th, 9th, 12th, 13th, 16th, 17th, 18th, 19th and 22d breaches to the 1st and 2d pleas; and rendered judgment for the plaintiffs on the demurrers to 3d, 4th and 5th pleas of the defendant. The plaintiffs then suggested similar breaches to the defendant's 3d, 4th and 5th pleas as they had assigned to the 1st and 2d pleas. Upon the issues joined upon the several rejoinders of the defendant to the several breaches assigned by the plaintiffs to the *first* and *second* pleas, and to the issue joined to the *sixth* plea, the jury found for the defendant, although in the record the verdicts were informally stated by the clerk, and which by consent of the parties were amended. The jury also returned the following inquisition as to the breaches suggested to the 3d, 4th and 5th pleas, viz. "We the undersigned jurors, being duly empannelled, under and by virtue of an order of this court, for inquiring at bar, to assess the damages sustained by the plaintiffs by reason of any breaches assigned and suggested by them in this cause, upon which issues in fact were not joined, and verdict given for the

defendant, and being duly sworn thereto, in open court, having made inquiry thereof, do, upon our corporal oaths, find as follows; that is to say, upon the second breach, the third, sixth, seventh, tenth, eleventh, fourteenth, fifteenth, twentieth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth breach, assigned and suggested by the plaintiffs under the third plea; and upon the same breaches, numbered as aforesaid, and assigned and suggested by the plaintiffs under the fourth plea; and upon the same breaches, numbered as aforesaid, and assigned and suggested by the plaintiffs under the fifth plea, that the plaintiffs have sustained and proved damage to have been sustained by them, and under the direction of the court, the jury find for the plaintiffs, and they assess the damages of the plaintiffs to one cent, and no more, on each breach above mentioned. In witness whereof, the undersigned jurors have to this inquisition set their hands and seals, in open court, this twelfth day of May, in the year of our Lord one thousand eight hundred and twenty-four." Signed and sealed by the jurors. The plaintiffs then moved the court to order judgment to be entered upon the said inquisition. Which motion the court overruled, and directed judgment to be entered for the defendant.

*Bills of Exceptions.* 1. The defendant, by his counsel, just previous to the swearing of the jury, in the above case, at this present term, asked the leave of the court to amend his pleadings by pleading and filing the following plea, numbered 6. [Which was a copy of the *sixth* plea heretofore inserted.] To the making which amendment, the plaintiffs, by their counsel, objected, because said plea came too late, and was incompatible and inconsistent with the defendant's other pleas, and against the eleventh and thirty-third of the standing rules of this court, viz.

"Rule XI. The 20th day of February, and the 1st day of September, shall be the rule days; and whenever a rule is laid to declare or to plead, the declarations and pleadings are to be filed on or before the rule day; when a declaration, or any part of the pleadings is filed on or before the rule day, in pursuance

of a rule previously laid, the adverse party shall be bound to answer the same, and to file the pleadings necessarily arising in succession, on or before the second day of the next succeeding term, either party failing to comply with this rule, may have judgment of *non pros.* or by default, entered up against him, whenever the action is called, upon the first going over the docket; but the general issue plea may be pleaded by a defendant at any time before judgment by default is entered against him, although he hath not pleaded before the rule day; this, however, will never be considered as a reason to delay the trial."

"Rule XXXIII. No incompatible pleas shall be received; as *non assumpsit* and tender; *non assumpsit* and release; *non assumpsit* and infancy; *liberum tenementum* and justification; *nil debet* and *nil habuit in tenementis;* not guilty and *liberum tenementum;* not guilty and license; *non est factum* and payment or set off, and *non est factum* and release." But the Court, [*Archer*, Ch. J. and *Hanson* and *Ward*, A. J.] overruled the objection, and gave the defendant leave to amend his pleadings in the manner aforesaid, by filing said plea. The plaintiffs excepted.

2. On the trial of this cause, the plaintiffs to support the issues on their part, produced as a witness, *Henry Payson*, to prove that he was president of the *Union Bank of Maryland* from the 27th April 1812, until the 27th May 1819, and thereafter; and that *Ralph Higginbothom* was acting as cashier of said bank from its first organization, until the 27th May 1819; that a certain book now shown to him with the words "by-laws," printed in gilt letters on the back thereof, and the same words on the 1st page thereof, which it is agreed shall be part of this bill of exceptions, was, during the time he was president of said bank, one of the books of the bank, and that the rules therein contained (and which it is admitted are truly transcribed in the plaintiffs' replication,) were always considered by the directors and officers of the bank, as the by-laws of the bank, and under which the said directors and officers always acted, and that he as president of the bank was the depository of the said book, and that said by-laws in said book, were in

the handwriting of the said *Higginbothom;* and that said *Payson* (the witness,) was summoned as a witness by both parties, and examined without objection, by plaintiffs, and cross examined by defendant at a former trial of this cause, at March term of this court, 1822, and that, to the best of his recollection, he stated at said former trial, that he, the witness was, during all the time aforesaid, owner of stock in said bank; and the said witness being now duly sworn, stated that he is now a stockholder in said bank, and has no recollection, that when he was examined as above stated, at the former trial of this cause, he was then examined as to the fact of his being a stockholder in said bank, but that he has every reason to believe that the defendant and his counsel then knew that he was a director and stockholder in the said bank; and thereupon the defendant, by his counsel objected to the said witness as incompetent to prove any of the matters aforesaid, except that he is a stockholder, and stated himself on his examination at the said former trial, to have been then a stockholder. Which objection the court sustained, and excluded the witness. The plaintiffs excepted.

3. At the trial of this cause, the plaintiffs, to prove the issue on their part, offered in evidence—*First.* A paper entitled "Articles of Association of the *Union Bank of Maryland,*" which paper it is admitted by the defendant, contains the original articles of association, under which the bank transacted business prior to the passage of the act of incorporation, and which paper it is agreed shall be herewith filed as a part of this exception. *Second.* The plaintiffs produced a book, on the back of which is printed in gilded letters, the words "by-laws," which book is herewith filed, and is to be considered a part of this exception; and the plaintiffs offered in evidence that the said book is one of their books, and is the one in which the proceedings of the *President and Directors of the Union Bank* were entered, so far as the same were reduced to writing, and contains the proceedings as aforesaid, so far as the same were reduced to writing, from the time of the original association until the charter was obtained, and also after the charter was obtained until the year eighteen hundred and nineteen; that there is no other book in which the proceedings of the presi-

dent and directors as aforesaid, were entered during the said period aforesaid, and no other writing or memorandum of their proceedings when they were assembled as the president and directors as aforesaid. *Third.* The plaintiffs offered to read in evidence from the said book, a writing headed the by-laws, under which, as the plaintiffs allege, the said president and directors acted. *Fourth.* The plaintiffs offered to read from the said book a resolution passed by the board of directors of the original association, on the 27th of September 1804, "That notice be given in the public newspapers in this city, that a petition would be presented to the general assembly of *Maryland*, at their next session, for a law to incorporate the stockholders of the said institution." *Fifth.* The plaintiffs offered in evidence the act of incorporation, and the several other acts of assembly, relating to the said incorporation, duly authenticated, copies of which are herewith filed, and are to be considered as part of this exception by agreement of parties. *Sixth.* The plaintiffs offered to read from the said book, entitled "by-laws," the following entry: "Thursday, 24th January, 1805. At a meeting of the president and directors this day, the members on behalf of the state being present, the charter, so far as it relates to the oath of officers, being read, it was resolved, That the president, each director, and *cashier*, take the following oath or affirmation, as the case may be—'I ———, do swear or affirm, that I will faithfully, impartially, diligently and honestly, execute the duties of a *director*, agreeably to the provisions of law, and the trust reposed in me, to the best of my skill and judgment.' This being done, they proceeded to vote on the propriety of advertising," &c. which said entry the plaintiffs gave in evidence, was in the handwriting of the said *Ralph Higginbothom*. *Seventh.* The plaintiffs offered to read an entry from the said book before mentioned, as follows: "Whereas by an act to incorporate the stockholders in the *Union Bank of Maryland*, it is, among other things enacted, that an election for sixteen directors, to conduct the affairs of the said bank, shall be annually held on the first Monday in July. And whereas the said first Monday in July may sometimes fall on the fourth of said month, on which the bank will be shut, agreeably to the provisions of the fourth article of the by-laws, or-

dained and passed for the regulation and government of the said corporation," &c. *Eighth.* The plaintiffs offered to read from the said book, an entry made on the 30th of August 1819, in the following words and letters, "*S. Etting*, *D. Winchester* and *A. Ellicott*, are appointed a committee to revise the by-laws." *Ninth.* The plaintiffs offered in evidence the by-laws, as revised, a copy of which is herewith filed and agreed to be considered as a part of this exception. *Tenth.* The plaintiffs offered in evidence the bond in the declaration mentioned, which it is admitted was signed and sealed by the defendant in this cause. The plaintiffs, further to prove the issues on their part, produced *John Hollins*, a competent witness, who gave in evidence to the jury, that he was a member of the corporation of the *Union Bank*, at the time of its incorporation, and had been so under the articles of association; that he continued to be a member of said corporation for several years after the act of incorporation. The said witness also gave in evidence, that upon inspection of the book marked "by-laws," as produced in court, he knew the said "by-laws," or regulations entitled "by-laws," and many of the other minutes written therein for a long period after the act of incorporation, as well as before the said act from the commencement of the association, to be in the handwriting of *Ralph Higginbothom*, who was at the time of the said writing, and afterwards, the cashier of the said bank; the said witness also gave in evidence, that he believed the said writings entitled, "by-laws," as aforesaid, to be the true by-laws of the plaintiffs, and adopted and used by them, although the witness did not know that he had ever before seen the book in which they were written, his memory as to this matter being too uncertain to identify the said book; and the said witness being interrogated to each "by-law" separately, as written and numbered in the said book, gave in evidence, that while he was a director in the said bank, it was the usage of the said bank to act according to the first article of the said by-laws, whether the bank acted agreeably to the second article he did not remember. That the bank practised conformably to the 3d article, also to the 4th. To the 5th article of the by-laws, the witness gave in evidence that the president and directors for the first five or six months after their association, and before the

act of incorporation, met but once a week, but at the end of that time, the said president and directors met always twice a week, and this article was then complied with. That the bank acted according to the 6th article, and also the 7th and 8th. The 9th article the witness could not say how far it was complied with, as it would have required a person to be in the bank to know it; of the following articles up to the 20th, the witness gave in evidence, it was the usage of the bank to act according to them; of the 20th article he did not remember; the 21st article was a customary rule; the 22d article he did not remember that it was complied with, but that it was understood by the directors to have been a part of their duty; the 23d article he did not recollect; the 24th and 25th were according to the usage of the bank; and to the 26th, the witness stated that he knew of no revision of the by-laws. The witness further gave in evidence, that he never heard of any other by-laws, than those which had been read. The plaintiffs further produced *Solomon Birckhead*, a legal and competent witness, who gave in evidence that he was formerly a member of the association, and one of the first board of directors, and that he remembered there were by-laws in the said bank, although he could not undertake to identify them. The plaintiffs also produced *Stewart Brown*, a legal, competent witness in the cause, who gave in evidence, that he also had been a director in the said bank, for one or two years, a short time after its incorporation, and had also been a member of the association. The witness further stated that he was not acquainted with the by-laws produced in court, his memory not being sufficiently strong to enable him to recollect, but upon hearing them read, he gave in evidence that the direction and government of the bank, was in general conformable to these regulations, but never saw the rules now produced, or any other. The plaintiffs further offered *James A. Buchanan*, a legal and competent witness, who gave in evidence that he had been a member of the original association, and also of the bank, after its incorporation, and was for some time a director; that he had no recollection that he had ever seen the by-laws, though he presumed he had seen them as a director. Being examined to the by-laws separately, the witness gave in evidence, that with the exception of the articles Nos. 1, 2, 10,

11, 12, 13, 20, 23 and 26, of which he had no distinct recollection, he remembered that the bank was usually regulated according to the system prescribed in the said by-laws, and particularly in regard to the cashier's duty, as contained in the 19th article; he remembers that such regulations were required of him, and in regard to the 25th article, he remembered such a rule, although he knew nothing of its execution; the witness further gave in evidence, that he knew of no other regulations of the bank, than those read, and that in general, he believed them to have been complied with, yet that they were not rigidly observed, either by the directors or officers. The plaintiffs further produced *George T. Dunbar*, a legal and competent witness in the cause, who gave in evidence that he was a clerk in the bank of the plaintiffs, at the time of the act of incorporation; that at that time the said *Ralph Higginbothom* was the cashier of the bank of the plaintiffs, and the said writings, entitled, "by-laws," are in the hand-writing of the said *Ralph*. And also that the minutes in the said book, from the commencement of the institution, until the act of incorporation, and from that time for several years afterwards, are in the handwriting of the said *Ralph*, and the said minutes were kept by the said *Ralph*, who was considered in the bank the proper officer to write the said minutes. The said witness also gave in evidence, that while he remained in the bank, the said *Ralph* was in the habit generally of performing the duties, though not with regularity, assigned to the cashier by the 19th article of the by-laws. The plaintiffs produced *Thomas N. Gouldsmith*, a legal and competent witness in the cause, who gave in evidence that he had been a clerk in the said bank for the last ten or twelve years, during the greater part of which time the said *Ralph* was cashier of the said bank; that in the book, entitled, "by-laws," many of the minutes, and particularly those purporting to be during the first five or six years of the charter, are in the handwriting of the said *Ralph*, and that the said writings, entitled, "by-laws," are all in the handwriting of the said *Ralph*. The witness further gave in evidence that said *Ralph* was in the habit of performing the duties which are enumerated as duties of the cashier in the 19th article of said by-laws, or that he professed to perform them, though it was

done with irregularity. The plaintiffs also produced *George Taylor*, a legal and competent witness, who gave in evidence that he was a director in 1817 or 1818—that when he was elected a director, he inquired at the bank for the by-laws, and that a book or paper containing by-laws, similar in purport to those which were produced by the plaintiffs in court, and read to the other witnesses, were delivered to him by some officer of the band; that he remembered them, because the board acted according to them while he was a director, though they were not very rigidly observed; he remembered them also from the fact, that discussions as to what were the rules in particular cases would sometimes take place at the board, and that such questions would be decided by the older members, who were more conversant with the rules than himself, in a manner agreeable to the rules he had heard read, but no book or paper containing the by-laws was ever produced; he did not particularly recollect the book in court, so as to be able to identify it. The witness further stated, that he was in the bank when the new by-laws were adopted in 1819; that he was present at the meeting when the new by-laws were adopted, and that these old ones, now in court, were the by-laws which were revised by the board; that the bank, as long as he was a director, and until the new by-laws were adopted, corresponded in its regulations and government, with the system contained in the by-laws in the book now offered in evidence, and that the witness never heard of two sets of by-laws previous to the revision, as above mentioned. The plaintiffs further produced *Jonathan Pinkney*, a legal and competent witness in the cause, who gave in evidence, that he is, at this time, the cashier of the plaintiffs, and had been so from the year 1819. That when he came into the bank he found the book, entitled, "By-Laws," among the other books of the corporation, and that the said book had the reputation in the bank of being the former by-laws and minutes of the corporation, and that the new by-laws were adopted a short time before he became the cashier of the plaintiffs; the said witness also gave in evidence that the said by-laws, as well as the minutes for several years, were in the proper handwriting of the said *Ralph Higginbothom*, the former cashier. The plaintiffs further gave in evidence by *Elias Glenn*, Es-

quire, a competent witness, that he was a director in the *Union Bank* for two years, and thinks he was so between the years 1806 and 1811; knows that certain by-laws were handed to him when he was sworn in as a director, or about that time, and that he read them, but the contents of them he does not recollect; he thinks that when they were shown to him, some of the other directors told him the bank had a set of by-laws, and that it would be necessary for witness to read them, as he was now a director; witness is not sure that the by-laws he read were in a printed or written form; he never heard of but one set of by-laws, in said bank; does not know whether the by-laws contained in the book produced by the plaintiffs, entitled, "By-Laws," are the same as those he read, some of them, as far as he has now read them, which is to the seventh in said book, were exactly the same as the usage of the bank, and some were not, but he does not say that the said by-laws in said book, were or were not the rules of the bank. He says, that so far as the word "week," at the end of the fourth line of the 5th article of the by-laws in said book the usage of the bank was in exact conformity with said rule, but that the usage of the bank was directly contrary to that part of the said articles, which directs that the discounts should not be paid till after 12 o'clock of the day on which the discount was made; that they were paid out at any time after they were made, and passed to the credit of the persons for whom they were made; he does not think the board ever sat so long as 12 o'clock at their discount meetings. Witness has himself often drawn out his discounts before 12 o'clock, as well as those which were made for himself, as upon the checks of other persons, for whose use discounts were made; that he has had a conversation lately with Mr. *Etting*, one of the directors of the bank at the present time, and one of the present plaintiffs, and that Mr. *Etting* told him, in that conversation, that it has ever been the usage of the bank to pay out discounts whenever they were applied for without regard to time; witness does not undertake to say whether such a rule as that discounts should not be paid out till after 12 o'clock existed or not. The defendants then offered in evidence, from the minutes in the said book of the proceedings of the plaintiffs, that there is no entry or memo-

randum of the adoption of the writing above produced, as the by-laws of the said bank by the vote of the said corporation, or of the president and directors thereof; that the proceedings in 1819, upon the subject of the revision of the by-laws, were after the dismissal of the said *Ralph Higginbothom* from employment in the said bank, and also, that the minutes in the said book contain no memorandum of the appointment of the said *Ralph* as cashier of the said bank after it was incorporated. And thereupon the defendant, by his counsel, objected to the reading of the said writing, headed "by-laws," produced as above mentioned, as and for the by-laws of the said corporation, and as prescribing, among other things, the duties of the said *Ralph*, while he was in the employment of the said bank; and the court were of opinion that the said writing could not be read in evidence for the purposes aforesaid. The plaintiffs excepted.

4. The plaintiffs, in addition to the matters and things contained in the preceding bills of exceptions for the plaintiffs, further produced in evidence the bond and condition, of which oyer is given in this cause, as set forth in the pleadings; and also gave in evidence, that the defendant signed and sealed the same; and further gave in evidence by *Jonathan Pinkney*, the present cashier of the said bank, that when he entered upon the said office on the 16th November, 1819, he found the said bond, as now produced, deposited among the archives and valuable original papers and documents of the said bank, in an iron chest in the banking-house of the said corporation, together with other papers purporting to be the bonds of the tellers, book-keepers, and other inferior officers of the said bank, and that this bond had ever since so remained in possession of the said bank, until it was delivered out to the attorney of said bank by the witness, as cashier thereof, to be used upon the trial of this cause. Whereupon the court inquired of the plaintiffs' counsel whether there was any evidence that the bond, upon which this suit was brought, had ever been received as satisfactory by the *President and Directors of the Union Bank* other than what is stated in this and the preceding exceptions, and being answered by the plaintiffs' counsel in the negative, instructed the jury that the cashier, before he entered

upon the duties of his office, was required by the act of assembly to give a bond, with two or more sureties to the satisfaction of the president and directors, for his good behaviour, and there was no legal evidence of any bond having been given to their satisfaction, which could bind the sureties in this case; and they must therefore find for the defendant on the issue joined on the *sixth* plea. The plaintiffs excepted.

5. Upon the evidence contained in the preceding bills of exceptions, the plaintiffs, by their counsel, prayed the court to instruct the jury, 1st. That the jury, in the absence of all other evidence respecting the execution of the said bond, were at liberty to infer from the foregoing evidence that the said bond was duly executed and delivered by the said defendant, and duly accepted by the said plaintiffs, notwithstanding no written evidence of the acceptance thereof by the said corporation, or its board of directors, was adduced by the plaintiffs at this trial, and that a written acceptance thereof was not necessary to give validity to the bond. 2. That under the issue joined upon the sixth plea of the defendant, the production of the said bond by the plaintiffs, and their possession thereof, together with the proof and admission that the defendant had signed and sealed the same as aforesaid, were sufficient *prima facie* evidence of the due execution, delivery and acceptance thereof in law, and that the burden of proof of the non-acceptance thereof, or of the other special matter set forth in the sixth plea, lies upon the defendant; and in the absence of all proof on the part of the defendant touching the matters set forth in the said sixth plea, the jury ought, on the issue joined upon that plea, to find a verdict for the plaintiffs. Both of which directions the court refused to give; but were of opinion, and so instructed the jury, that the cashier mentioned in said bond, was required by the act of assembly to give a bond with two or more sureties, to the satisfaction of the president and directors of the bank, for his good behaviour, and there was no legal evidence of any bond having been given to their satisfaction which could bind the surety in this case, and they must therefore find a verdict for the defendant on the issue joined on the said *sixth* plea. The plaintiffs excepted.

6. At the trial of this cause, and after the opinion and direction had been given by the court, as stated in the fourth and fifth bills of exceptions of the plaintiffs, in order to prove the breaches and damages assigned and suggested in this cause, in addition to the testimony stated in the preceding exceptions, offered to give in evidence the several original corporation books of the plaintiffs, called offering books, legers, scratchers, cash books and statement books, which purported to contain as well the accounts of the said bank with its customers, as also statements of the affairs, property, debts and credits, of the said corporation, during the whole period between the 20th of January 1805, and the 6th of February 1817, and to prove that the said books were kept by a certain *Pierce L. Tanner*, and a certain *Jacob Hart*, as officers of the said corporation, during the time aforesaid, and to prove that the said *Pierce L. Tanner* was resident out of the jurisdiction of this court in parts unknown, and that the said *Jacob Hart* was dead, and that the several entries contained in the said books, were in the proper handwriting of the said *Tanner* and *Hart*, and were kept under the superintendance and direction of the said *Ralph Higginbothom*. And also offered to prove by the said books, that divers false entries, mistakes, omissions, irregularities and material disagreements, occurred therein by the neglect and fraud of the said *Ralph Higginbothom*, and the said *Pierce L. Tanner*, and that there were great deficiencies in the funds of the bank, by reason whereof the plaintiffs had sustained great losses. Whereupon the defendant, by his counsel, prayed the opinion of the court to the jury, that upon the evidence and directions in the preceding exceptions, the evidence offered as stated in this exception, is not admissible for the purpose of proving the plaintiffs entitled to damages either on the issues joined or on the breaches suggested; which opinion the court gave, and accordingly rejected the evidence. The plaintiffs excepted; and the judgment being for the defendant, the plaintiffs appealed to this court.

The cause was argued at June term last, and afterwards reargued in writing, before BUCHANAN, Ch. J. and EARLE, MARTIN, and DORSEY, J.

*Mitchell*, and *Kennedy*, for the Appellants, contended,

1. That the liability of the defendant on the bond extended to a period beyond the original term to which it was enacted that the charter should continue.

2. That the execution and delivery of the bond were sufficiently proved on the part of the plaintiffs to hold the defendant liable in this action.

3. That the defendant's sixth plea ought not to have been accepted. 1. Because it came too late and by surprise on the plaintiffs. 2. Because it is incompatible with the other pleas in the cause.

4. That the court below erred in taking from the jury, as stated in the plaintiffs' 4th and 5th bills of exceptions, the question of the due delivery, execution and acceptance of the bond; and also that the court erred in refusing the two prayers of the plaintiffs contained in their 5th bill of exceptions, and in the opinion and instructions given by them as stated in said 5th bill of exceptions.

5. That if acceptance of the bond, on the part of the plaintiffs, were necessary, that fact was sufficiently proved by their possession of the bond and the other evidence offered in the cause, and ought to have been left to the jury; and that the court erred consequently in the opinion expressed in the plaintiffs' 4th bill of exceptions.

6. That it was not necessary that the bond should be accepted in writing.

7. That the by-laws of the bank were sufficiently proved by the evidence in the cause.

8. That the court erred in rejecting the evidence, as stated to have been offered, in the plaintiffs' 6th bill of exceptions, the said evidence being proper to have gone to the jury to prove the breaches assigned and suggested by the plaintiffs.

9. That the court erred in rejecting the testimony of *Henry Payson*, and in sustaining the objection made by the defendant's counsel as set forth in the plaintiffs' 2d bill of exceptions.

10. That the court were in error in sustaining the demurrers by the defendant to the breaches assigned under the 1st and 2d pleas; because all the said breaches were good as far as they charged the defendant with defaults from the date of the bond.

11. That a judgment according to the prayer of the plaintiffs ought to have been entered in their favour upon the inquisition by the jury; and that the judgment entered in favour of the defendant was erroneous.

1. *As to the first bill of exceptions.* The *sixth* plea ought not to have been *received*—considering the *other pleadings* and the *time* when offered. It was inconsistent with the first plea of *performance*, and the second plea of *payment.* The cases in the books, will sufficiently show the court that these pleas are deemed incompatible in the *English* practice, and never allowed there, unless by special application to the court within the first rule-day for pleading, so that the parties may have early notice and come fully prepared to try both issues. But what was the case here? The cause had been at issue upon *all* the pleadings more than *three years.* The first rule to plead had expired as early as the 1st of September, 1819, and the leave to amend had expired on the 20th of February, 1824. The XI. rule inhibited all special pleas after the rule-day had expired, and the XXXIII. rule had expressly enacted as the law of the court, that the pleas of *non est factum* and *payment, set off* and *release*, should not stand together. The defendant has sworn to this plea—of course he was always apprised from the commencement of the suit, (March term, 1819,) of this defence. With this knowledge he lies by *five years*, until 8th May, 1824, and at the moment of trial, more than thirty days after the commencement of *that term*, and after all the witnesses had been summoned and were attending, and just as the jury were about taking the oath, he comes down upon the plaintiffs with a new plea, requiring a new replication and new proof, and other witnesses. It will be observed that the replications to the 1st and 2d pleas allege the *due execution of the bond*—the appointment of the cashier, and his acting under the bond; and issue is joined on the breach of his duties alone—so that under the issues already joined the execution of the bond was *admitted.* The standing rules of the court also further guaranteed the plaintiffs against surprise from *any* special plea at that time, and especially against a plea contradicting what was already admitted upon the record. And yet the court, without rescinding those rules, and with no special reason as-

signed for dispensing with them, received this new plea and compelled the plaintiffs to reply *instanter* and proceed to trial on this new issue, or to submit to a further delay of six months, after the suit had been procrastinated five years! How the learned counsel can argue that this was no surprise upon the plaintiffs, or how they have discovered that no continuance was asked, cannot readily be divined. The surprise was inevitable, and no such fact is stated upon the record, as a waiver of time to reply, and cannot be presumed—although on *principle* it would not vary the hardship of the case. This court, it is believed, will decide this exception upon principles applicable to *all* cases, and it is most respectfully submitted, whether the first exception exhibits a proper exercise of the sound discretion entrusted to the county courts by the acts of assembly of 1809, *ch.* 153, *s.* 1.

2. As to the *fourth* and *fifth bills of exceptions.* In considering these exceptions *together*, it is proposed to inquire in the first place on which party the proof lies by the 6th plea 1st. As to the *onus probandi.* The 2d prayer of the 5th bill of exceptions asserts that the burden of proof is cast *on the defendant* by this issue; and that in the absence of all proof on *his* part and the production of the bond by the plaintiffs, coupled with the admission that the defendant signed and sealed it, entitled the plaintiffs to a verdict on this issue. The defendant's counsel deny this proposition, on the ground that the special circumstances stated in the plea are not put in issue—but merely the *conclusion* which contradicts an affirmative in the declaration, and so puts the plaintiffs to prove their averment. They urge with much subtlety, that if the special circumstances stated in the plea are to be considered as new matter in avoidance, the plea should have concluded with a verification, whereas it is well established that such a plea ought to conclude to the country. It is admitted that the conclusion of this plea is right; but the fallacy of this ingenious argument lies in the application of the ordinary rules of pleading in other cases to the plea of special *non est factum*, or as Lord *Coke* terms it, the general issue *with an issent.* 5 *Com. Dig.* 387. *Whilpdale's* Case, 5 *Co. Rep.* 119. This is a peculiar plea, which impliedly *admits* the signing and sealing, but seeks to avoid the writ-

ing *as a deed*, by reason of extrinsic circumstances. It is a plea *sui generis*, and disused in modern times for the reason assigned by Lord *Holt*, in *Bushell vs Pasmore*, 6 *Mod.* 218. "That it is impertinent, as it puts the *defendant* to proof of such extrinsic circumstances in avoidance, in consequence of the implied admission contained in it." One of the defendant's counsel argued as if it were optional with the defendant to shift the burden of the proof by the form of the *conclusion*. If the defendant concludes with a verification, then the plaintiff (says he) may take issue upon either of the facts; but if the conclusion be to the country, the preceding matters are only inducement and cannot be traversed; so that the plea is in *that case* only the simple general issue denying the averments in the declaration. It would be indeed an extraordinary rule in pleading, that the affirmative of the issue should *depend* upon the conclusion of a plea. The conclusion of a plea depends on the simple inquiry whether there be a direct averment and denial, without regard to the nature of the issue. The rule is well established, "that if the plea conclude with a *special* negative to the affirmative in the declaration, (as in this case,) it *must* conclude to the country, and the *defendant* must prove the special matter, if the plaintiff join issue upon the whole plea." The *similiter* puts the *whole plea* and not the *conclusion* of it in issue. Thus, in covenant, if the breach consists in nonpayment of a sum of money at the day, or in not repairing, and the defendant avers payment or repair, and concludes to the country; yet the issue lies on the *defendant*. So if lessee is to pay rent during the life of *J. S.* and the plaintiff avers a breach and the continuance of *J. S's*, life, and the defendant asserting the death of *J. S.* concludes to the country and *specially* negatives the averment in the declaration; yet the burden of proof lies on the *defendant*. 1 *Chitty's Plead.* 535, (537.) Again, "A conclusion of law is never traversable." Whether the special matters of fact set forth in the plea are sufficient to avoid this deed if proved, is a question of *law;* whether these exist or not is a question of *fact*. If the defendant had concluded with a verification, the plaintiff must have denied specially the matters of fact set up in the plea, and tendered an issue to the country, in which the defendant *must* have joined; because he

could only reassert the same matters in a rejoinder, and could not depart from his plea; but as he concludes this plea to the country, the plaintiff had no alternative but to add the *similiter* which denies the *whole matter* of fact asserted in the plea. (1 *Chitty's Plead.* 549.) Neither party is at liberty to conclude *either* way as he may deem fit, excepting only in the single case where one of several facts is denied with a *formal traverse.* 1 *Chitty's Plead.* 538, 549, (550.) Where the words, *"virtute"—per quod "pretextu," et "ita quod,"* &c. introduce a consequence or inference from preceding matter, they are *not traversable. Priddle & Napper's* case, 11 *Coke*, 10. *Henry Pigot's* case, *Ib.* 27. *Beal vs Simpson*, 1 *Lord Ray.* 408. *The King vs The Mayor, &c. of York*, 5 *T. R.* 66. *Bennet vs Filkins*, 1 *Saund.* 23, *(note 5.)* 5 *Com. Dig.* tit. *Plead.* (E. 30,) 412. 1 *Chitty's Plead.* 627. See *Precedents*, 2 *Chitty's Plead.* 589. That the proof of this issue lies exclusively on the defendant by long established and unshaken decisions, appears from the following authorities. *Bushell vs Pasmore*, 6 *Mod.* 218. *Henry Pigot's* case, 11 *Coke*, 27. 1 *Chitt. Plead.* 478, 479. *Gardner vs Gardner*, 10 *Johns. Rep.* 47, 49. *Van Valkenburgh vs Rouke*, 12 *Johns. Rep.* 337. *Coare vs Giblett*, 4 *East*, 94, 95. *Butler & Baker's* case, 3 *Coke*, 26. 3 *Dane's Ab.* 466. *Souverbye vs Arden*, 1 *Johns. Chan. Rep.* 250, 255. 5 *Com. Dig.* 643. *Whelpdale's* case, 5 *Co. Rep.* 119. *Stark. Evid.* 479, 474. 1 *Phil. Evid.* 128, 129. *Bull. N. P.* 172. 2d. But 2dly, admit the issue lay upon the *plaintiffs*, have they not given sufficient *prima facie* evidence of the due execution and acceptance of this bond to justify the *first* prayer in the *fifth* bill of exceptions? Possession of a bond by the obligee, and proof of signing and sealing by obligor, are in ordinary cases sufficient to justify an inference of due delivery and acceptance. Even Chief Justice *Marshall* admits this to be so in the case of *individuals;* and that assent or acceptance are to be *presumed* from the beneficial nature of the grant or deed—indeed it will not be denied by our learned opponents. That such is the established doctrine in *England* and in several of the *United States*, appears from *Butler & Baker's* case, 3 *Co. Rep.* 26. *Periman's* case, 5 *Co. Rep.* 84. *Souverbye vs Arden*, 1 *Johns.*

*Ch. Rep.* 250, 255. *Wood vs Owings*, 1 *Cranch*, 251. *Jackson vs Phipps*, 12 *Johns. Rep.* 418. *Clarke vs Ray*, 1 *Harr. & Johns.* 323. Acceptance is always *implied*, and *refusal* must be proved to defeat the deed. *Shep. Touch.* 54, 56, 57, 74, 75. *Whelpdale's* case, 5 *Co. Rep.* 119. 2 *Stark. Evid.* 479. *Johnson vs Baker*, 4 *Barn. & Ald.* 440. *Wankford vs Wankford*, 1 *Salk.* 301. Is there any feature in the structure of *corporations* to subject them to a different rule? The decision of Chief Justice *Marshall*, at *Richmond*, gave birth to the *sixth* plea in this case. But that decision proceeded upon the old settled doctrine, that secondary evidence could not be admitted which presupposed better evidence behind, and within the power of the party. He presumed there was written evidence of the acceptance in that case; *but that decision has been overruled by the supreme court at the last session*, (the chief justice being the only dissentient)*(a)*. Nay, this very point has been settled with us in this court in the case of *The Farmers' Bank against Whittington*, 6 *Harr. & Johns.* 548. In that case this court held, with his Honour Judge *Martin*, who tried the case, that unless it actually *appeared* that there *was* a written entry of the fact offered to be proved by parol evidence, then such evidence was admissible to prove any act of a corporate board or body. It appearing from the record of the proceedings, that there is no such entry in this case, parol evidence is admissible to prove the delivery to the obligees and their acceptance of the security.

3. The evidence offered in this case was *sufficient* to warrant this inference by the jury, and the court therefore erred in the opinions stated in the *fourth* and *fifth* bills of exceptions. 1st. It was *acted under* by the cashier and the bank; and even acceptance of a charter has been implied by a corporation acting under it. *The King vs. Barzey*, 4 *Maul. & Selw.* 255. *The King vs. Amory*, 1 *T. R.* 575. 2d. It was placed by the former cashier, who was the common agent of the *defendant* and of the bank, among the *muniments* of the bank, and *left in their possession*, when he left the bank. It was found by Mr. *Pinkney*, the present cashier, in the iron chest in the vault of the bank, which is not in the custody of the cashier, but of

*(a) Bank of United States vs Dandridge*, 12 *Wheat.* 64.

the *president*, as the court will perceive by the 18th and 19th articles of the by-laws. The corporate seal and valuable *muniments* of the bank are kept in this iron chest Finding the bond in such a place is good legal evidence of delivery. *Mechanics' Bank vs Bank of Columbia*, 5 *Wheat.* 337. *Fleckner vs United States Bank*, 8 *Wheat.* 357. *Patterson vs Bank of Columbia*, 7 *Cranch*, 299. *Trials per Pais*, 370. 2 *Bac. Ab.* 648. 5 *Bac. Ab.* 160. *Goodright vs Straphan*, 1 *Cowp.* 204. The case of *Smith vs The Governor and Company of the Bank of Scotland*, 1 *Dow's Reports*, 272, in the House of Lords, is quite conclusive on this subject, as to the sufficiency of an implied acceptance by that bank, and a complete delivery by the obligor. The bond in that case had been refused by the bank and sent back to their agent to be altered by the obligor. The alteration was made, and while the new bond was in *transitu* by the post office, and *before* it came to the hands of the board of directors, or its officers, the cashier was removed. Yet this was held by all the judges and the Lord Chancellor, in 1813, to be a sufficient delivery and acceptance to bind the surety. Compare the circumstances in that case with those that exist here, and can there be a loop left to hang a doubt on? But it is said, it ought to appear at least that a sufficient board was convened to approve. That it was a special power delegated to a special body by the charter, and must appear to have been strictly complied with by those claiming under it. That they have no common organ of language but when properly assembled and their voice made known by writing. If there were any force in these objections, no *implied* assumpsit could *ever* be obtained against a corporate body—No *agent* could be appointed by *parol* authority for any purpose. The supreme court of the *United States*, and most, if not all, of our state courts, have sanctioned such an assumpsit and such a power. If they can be bound by the acts of agents and by implied contracts, though no proof whatever of a regular assemblage of the directors, or of any vote conferring such powers upon their ostensible agents—*a fortiori*—May their concurrence be presumed when that is to give effect only to a contract *in their favour;* as in the case of *femes covert*, lunatics and infants, *to whom* a grant is valid, though they cannot

contract so as to *bind themselves?* It is further said, that *Higginbothom*, acting as cashier, affords no presumption of his duly qualifying under the *charter*, because he acted as such under the *articles of association* before the charter. The answer is obvious. The condition of this bond *estops* both *Higginbothom* and *Ridgely* from denying that *Higginbothom* was appointed and acted as cashier *under the charter*, for this recites his appointment by those to whom the bond is given, in March 1805. Now the plaintiffs had been incorporated on the 24th of January 1805. But the inquiry is not *when* he signed or *when* the bond was delivered or accepted. That is quite immaterial; for the obligation of the bond only commences from the time of the *first breach* of the cashier's duties. The statute of limitations only runs from the *breach*, and not from the *date;* nor is it declared on as an *obligation made* on any particular day, as seems to be supposed on the other side, but merely as a writing obligatory *bearing date*, &c. Are all the consecrated rules of evidence to be trampled under foot in this case because it is the case of *a surety?* Is not the presumption of law to prevail in *this*, as in ordinary cases, that the instrument was duly executed (signed, sealed and delivered, to the satisfaction of the obligees) on the day that it bears date, unless some tittle of evidence can be adduced to rebut such *prima facie* evidence? Are the court to presume a dereliction of duty in every board of directors for fifteen years in violation of their charter, and in fraud of the stockholders, whose agents they were, for the purpose of approving the cashier's bond, in order to raise a *conjecture* that they suffered this officer to exercise his functions, and committed to his custody all the funds of the institution during all this period, without any security for his good behaviour? Rather will the court presume *omnia rite acta* when no evidence is adduced to shake the good faith and intelligence of those who have acted so long in the direction of that public institution. It is urged further, that there must have been an acceptance by the *president and eight directors;* and that the bare custody of the bond can be no evidence of their satisfaction with the security, and the case is compared to bonds lodged on file on appeals and writs of error. Without examining the positions advanced re-

specting *such* bonds, which it is conceived are not sound, it is sufficient for our purpose to reply, that the cases are not at all analagous. The persons who were to approve this bond were the avowed agents of the *obligees* in their corporate character—a board of perpetual succession, and the same persons who have the custody and control of all the bonds, deeds and muniments of the corporation. Their possession is that of the corporate body itself. As well might it be contended, that the bank had no title to the lot on which their banking-house stands, because that was only built by their president and directors, and there does not appear any endorsement on the deed corresponding with its date of their acceptance of the grant, and no entry in their books of a meeting of the board on that day, nor of the *number* of directors who *were present* when the grant of that lot was accepted by a solemn vote. The universal practice of all corporate bodies throughout this country, and of all judicial and executive public officers must be violated, and all sheriff's, guardian's and administration bonds must be cancelled to make way for this unfledged novelty! We humbly think that ingenious argument must be sustained by something more weighty than a single *nisi prius* decision, however respectable, before this enlightened tribunal will be induced to plunge the people of this state into this unfathomable gulf of uncertainty, respecting all our public securities. It is thought unnecessary to pursue this branch of the argument through the wide range adopted on the other side, especially since the supreme court of the *United States* have decided that no written entry is essential to the validity of any corporate proceeding, and since this court have recently held the same doctrine in a much stronger case than the present. The case of the *Farmers' Bank vs Whittington* is considered by us as quite conclusive on this subject; a decision entitled to higher respect certainly, in this court, than *any other* that can be cited; and yet the learned counsel on the other side take no notice of the case, nor of the case of *Smith vs The Governor, &c.* from *Dow's Reports*, but treat the question as if it were still open.

4. As to the *demurrers*, relative *to the duration of the bond.* It is contended by the appellants that the defendant cannot bring in question the duration of the bond upon *these*

*demurrers;* and that if these breaches are well assigned in other respects, the appellants are entitled to judgment upon all the demurrers in *this* record, *whatever may be the opinion of the court as to the legal duration of the bond.* The court will remark, that the defendant has demurred to all those breaches in the replication which are assigned on a day *subsequent* to the 6th of February 1817, when it is alleged the first charter expired. These breaches may be divided into three classes. 1st. The first class consists of those in which the breaches are alleged to have happened on "various days and times from the day of the date of the bond until the 25th of May 1819." (These are the 4th, 8th, 12th, 16th and 22d breaches.) 2d. The second class consists of those breaches containing *three distinct epochs*, the last of which epoch is assigned thus, "and on various days and times from the 6th of February 1817, until the 25th May 1819," (the last day being subsequent to the limitation in the first charter)—such are the 1st, 5th, 9th, 13th and 19th breaches. 3d. The third class of breaches is where a specific act of fraud is charged on a particular day, that being a day *subsequent* to the expiration of the old charter—such are the 17th and 18th breaches. All these breaches are demurred to by *general* demurrer, on the ground that the *time* mentioned therein is too broad for the extension of the bond. Is the *time* mentioned in either of these breaches *material?* If not, the demurrers cannot be sustained. As to the *first* and *third* class of breaches, the court will observe, they all charged *tortious* acts, and in cases of *tort* the day laid is perfectly *immaterial.* It is not traversable; nor is the plaintiff bound to prove it as laid. Replications under the statute of *William* and *Mary* are subject to precisely the same rules as declarations. Lord *Coke* lays down the established doctrine in such cases. (*Co. Litt.* 282. 7 *Bac. Ab.* 33.) "When the jury upon a plea of not guilty in *modo et forma*, find the goods taken on a different day from that charged, though charged on a day certain, still the verdict is good, though the plea is in *modo et forma*, for the *substantial part* of the issue is whether the goods were taken." So *Chitty* in his treatise on pleading—"The statement of *time* of committing injuries *ex delicto* is seldom material. It may be proved to have been committed

on a day anterior or subsequent to that stated in the declaration, so that it appears to have been before action brought." 1 *Chitty's Plead.* 383. 2 *Chitty's Plead.* 367, 368. *White vs Stubbs*, 2 *Saund.* 295, *(note* 2.) So in *other* actions, where the day is not material in the declaration, the plaintiff may, when it is rendered necessary by the defendant's plea, vary from the day in the replication, and it is no departure. *Millor vs Walker*, 2 *Saund.* 5, b. *(note.)* As to the *third* class of breaches—the above remarks are equally applicable, and also the further observation, that here are *three epochs* quite distinct from each other; two of which are *confessedly good.* The *third* then is mere surplusage. It may be safely stricken out, and yet the breach be well assigned. "It is a rule that an entire replication bad in part is bad for the whole; but this rule does not apply where the matter objected to is mere surplusage." 1 *Chitty*, 617. "Immaterial averments need not be proved if they can be safely struck out," 1 *Phil. Evid.* 162, 164, *(note.)* 2 *Phil. Evid.* 82 Now in this case the averment of breaches from 6th of February, 1817, until the 25th of May, 1819, may be safely struck out. How then can the *general* demurrer to the *whole* breach be supported? Besides, in all cases where the *time* is improperly laid the demurrer must be *special.* It is only defect *in form.* The plaintiff may waive the time laid in the declaration *at the trial* if he will, and confine his proof within the time of his *title* in trespass, or of the *obligation* on a collateral bond. *Osborne vs Rogers*, 1 *Saund.* 269, (and *note* 21,) and *Manchester vs Vale*, 1 *Saund.* 24, *(note* 1.*)* By the *general* demurrers to this class of breaches, the defendant admits the cashier's breach of duty as charged on various days from the date of the bond *until February*, 1817. And are not the plaintiffs entitled to recover for *such defaults?* The defendant should have demurred to the averment in the replication, "*that R. Higginbothom continued to act as cashier under and in pursuance of the said bond until the 25th May*, 1819," which averment overreaches all the breaches—which would have presented the question of the legal duration of the bond to the court, (the acts of assembly and the bond being set forth upon the record.) Or he might have traversed this averment specially, and raised the question of law *at the trial*, or he

might have taken issue on these breaches and have objected at the *trial* to *any evidence* of defaults *after the 6th February*, 1817. In the numerous cases cited upon this branch of the argument where this question has been agitated, no one case can be found where the very learned counsel for the defendants, in *England* and in the *United States*, ever thought they could raise this question by demurring *to the time laid in the breaches* assigned under the statute. In *Curling vs Chalklen*, 2 *Maule & Selwyn*, 502, and in *Peppin vs Cooper*, 2 *Barn. & Ald.* 431, as well as in the cases of *Leadley vs Evans*, 9 *Serg. and Lowber*, 306, and *Miller vs Stewart*, 9 *Wheat*, 702, the question was fairly raised, by *a special plea* that the bond was annual, &c. Why was not such a plea put in here, so as to present to the judicial eye of the court the real question sought to be raised; but which it is believed cannot be raised on these pleadings without confounding all distinctions between material and immaterial averments. These views of the preliminary point under the second head of the argument, would seem to render the further discussion of the other points under *this head* superfluous; but as it is desirable to ascertain the opinion of the court upon all the points that may hereafter occur in the further progress of this cause, it has been deemed proper to discuss the question as to the duration of the bond, upon this argument. The defendant's, the appellee's counsel, have arranged this question under two heads. 1st. That this was an annual bond; and 2d. That it was only coextensive with the duration of the first act of incorporation—which will be considered in their order. 1st. *Was it an annual bond?* The whole argument on the other side rests upon a false assumption, that the cashier was an annual officer because he held his office *under annual officers*, viz. the president and board of directors. If we consider the nature of the *power* under which this officer was created, and the tenure by which he held his office, the fallacy of this argument will fully appear. The act of incorporation provides for the *annual election* of the *president* and the *directors;* fixes the day and mode of *their* election, and prescribes *their* respective qualifications. (See *fundamental articles*, 2, 4, 6, *sect.* 10.) Why are no such provisions made respecting the office of *cashier?*

The answer is obvious from article 10. The form of the bond shows that *he* was to be elected during *good behaviour*. No qualifications are prescribed for *this* officer; no limitation fixed to *his* office; no provision that *he* is to hold over in case no election is made on the day fixed, as in the case of directors. The duration of each board regularly terminates on the 1st Monday of July. If the cashier went out with them, how happens it that the 20th and 21st article requires the judges of the election *to notify the cashier* of the persons elected for the *new* board? As no provision is made for *his* holding over, of course *he* goes out of office the day *preceding the election* of the new board if he is only an *annual officer* and no cashier exists until one is chosen by the *new* board. Wherever the legislature intend the officer shall be appointed in a particular manner, and *hold for a specified term*, these are designated. (*Art.* 7. and *art.* 9.) But the cashier is to be elected by one body, and his bond is to be approved by another. The president has no voice in his *election;* but he and the board must both approve of the bond. The amount of the bond is fixed by the legislature, and also the form of it. And moreover, we find in the charter an oath prescribed for *this officer*, and for no other agent of the corporation. Is the cashier *thus* qualified, *thus* sworn, *thus* appointed, *thus* approved, to be viewed as the mere creature, deputy and valet of the directors, their shadow which disappears with their body? No! He is merely nominated by them in the execution of a statutory power, but when nominated, he is in by virtue of the statute, and under the power itself, as an officer of the corporation, and not as a deputy of its deputies, the board of directors. *Fox vs Harcourt*, 1 *Show.* 516, 532. S. C. 4 *Mod. Rep.* 167, and 5 *Bac. Ab.* tit. *Office & Officers*, (H.) 200. If a grant or an appointment be made *without limitation*, it is by the established rules of the common law a grant or appointment *for life*. If a statute creates an office *"quamdiu tantum se bene gesserit,"* the officer has a freehold in his place by the common law, determinable by misdemeanor alone. If the cashier be the officer of the *corporation*, that being a continuing body, his office is of course coextensive with the *"corpus corporatorum.."* *His acts bind the corporation* and *not the board of directors.* He is not the deputy of the presi-

dent and board, but of the corporation. His bond is to the corporation. The condition recites his appointment by the corporation, and the obligors are estopped from denying it. He is known to the public as the officer of the corporation, and as such his vouchers are recognized. Their notes, their correspondence, indeed all their transactions with the state and with other banks are stamped with the superscription of his image. The corporate body, though invisible in itself, is beheld through him *tanquam in speculo*. Is it not better for the corporation, for the public, and even for the surety himself, that this office should be permanent? He becomes daily more perfect from experience. He has a regular renewing bounty on his good behaviour. The risk of his surety is daily diminished, because his cares and duties become every day less onerous. *All* the cases cited on the other side, are cases of subordinate agents or officers acting *under annual* officers, and *binding* by their acts *annual officers alone*, whose power is forever spent with the expiration of the year; but wherever the persons to be affected by the acts of such subordinate agents have a continuing existence; wherever such agents represent and serve a continuing body, and act by virtue of a power that is not exhausted by the amotion of other agents holding by a more limited tenure, such subordinate officers hold over. Thus in the case of *Curling vs Chalklen*, 2 *Maule & Selwyn*, 502, cited on the other side, the churchwardens and parishioners acted conjointly in the appointment of a collector; yet his office was held a continuing office, notwithstanding the churchwardens were *annual* officers, and were removable at the end of the year; because the parishioners were still a continuing body corporate, whom the collector represented, though the churchwardens were gone, by whom he was nominated. The same observation will apply to *Hassel vs Long*, 2 *Maul. & Selw.* 363, and *Miller vs Stewart*, 9 *Wheaton*, 702, and indeed to *all* the cases cited against us. The court will find upon examination that these are *all* cases where the subordinate officer was the *deputy* of those who *nominated* him—that *his* life depended on *theirs* as his *principals*. The amotion or death of the *principal* then would of course vacate the power. But because the governor and council, who are *annual* officers, ap-

point the judges of this high tribunal, and also the chancellor of the state, was it ever suggested that those officers were *their* deputies and do not hold their offices during good behaviour? So in the case of our senators and registers of wills, though the appointing power may be extinct, the *result* of its exertion may be and is *lasting*. The learned counsel opposed to us rely on the words of the 8th section, as showing that the cashier was only a servant *"under them;"* that is, under the board of directors. This argument would reach too far; as it would leave to the board the same discretion as to the *necessity* or propriety of appointing *any* cashier as they are vested with, in relation to the *other servants* or officers there mentioned; to whom alone these words *"under them"* obviously refer; such as the *porter*, the *book-keepers*, *tellers*, &c. The cashier is as necessary an officer of the corporation as the president. The board of directors appoint *both*, and it might just as well be contended that the *president* is only a *deputy of the board* of directors and not an integral part of the corporation, as that the *cashier* is. 2d. Does the bond extend beyond the 6th February, 1817? This may be answered by another question—Is *this* corporation which sues *identical* with *that to which* the bond was given and *to whom* the service of the cashier was conditioned to be performed? If so, the bond is sufficiently broad to cover *the whole time* of *R. Higginbothom's* service as cashier of the president and directors of the *Union Bank*. It is to be borne constantly in mind, that the *words*, the *very terms* of the bond, cover *the whole time* that *Higginbothom* should hold the office. There is no limitation in the preamble or in any other part of the bond, looking to the expiration of the first charter. His appointment was not coextensive with their charter. It was during good behaviour. He held by no other tenure before 1817, and by the same tenure afterwards. Here was no *new* appointment of *Higginbothom* after the *new* charter, and if he did not hold his office legally *afterwards* by virtue of his *first* appointment at the time this bond was given, then *all* his *subsequent acts* were invalid and did not bind the corporation. He had no power, if this argument be well founded, to sign or issue bills, to discharge debts or receive deposits, or pay checks, &c. so as to bind the stockholders. He was

either cashier *to all intents* and purposes under his *first* appointment *from* 1817 *to* 1819, or not. If the *former*, then the surety has undertaken for his fidelity *during that period;* because no shorter period is limited by the *bond* than during his continuance in that service of those who appointed him. If the *latter*, then *no act* of the cashier after February 6, 1817, is valid in law. And the same construction which will absolve the surety here will annul and cancel every official act of *Higginbothom* respecting the concerns of the bank during those two years. If the corporation *after* 1817 was not *one and the same* with that *before*, then no part of the property, funds or notes of the old corporation belongs to this; no debts owing by or to the old corporation can survive to this; nor could the present plaintiffs maintain a suit upon this bond even against the cashier himself, because they are not the obligees according to that construction. But in *Scarboro vs Butler*, 2 *Levintz*, 237, it was held too clear for argument, that a debt due to a corporation is also due to the second corporation after a renewal of its charter, even though the name of the obligees is changed, and the debt shall be recovered in the new name. So it is laid down by Lord *Coke*, (*Co. Lit.* 52, b.) that an attorney's power is not countermanded even by a dissolution of the corporation. *Shepman vs Thompson*, *Willes's Rep.* 105. *Wynne vs Thomas*, *Ib.* 565. 2 *Livermore on Agency*, 298. Was the duration of this bond then extinguished when the service continued to be to the same persons and the terms of the condition are made coextensive with such service? When the defendant signed this bond, fixing the time of service under that appointment as the only measure of its duration, he must have known that the legislature might with the concurrence of the bank and of the cashier protract his risk and continue the officer beyond the time limited by the first law. Why did he not provide against this by the terms of the bond? As he did not, can he now ask the court to insert for him a new limitation in the contract and restrict it to the duration of the first charter, when he himself has fixed the limitation, not by that, but by the *term* of *service?* Suppose he had declared by parol *at the time he signed the bond*, that he *intended* it should only endure as long as the first charter. The court would not admit of such

parol explanation of his intention to contradict the plain import of the terms used by him in the writing. If the terms of service of *that corporate body*, is departed from, by construction, what rule can the court adopt? Shall it be a vague conjecture as to the *variance of risk?* Then every change of the clerks, every augmentation of the capital of the bank called in, every imposition of new duties upon the cashier by subsequent by-laws, varied the risk of the surety, by enhancing the responsibility of the cashier. If the court is to speculate on the political conjectures of the surety at the time, the practice of the legislature of this state must have led him to foresee that the charter would probably be renewed. Every charter had been renewed in *Maryland* whose limitation had run out. Such were the *Baltimore Insurance Company*, incorporated by act 1795, *ch.* 59, for nine years, renewed 1804, *ch.* 37; the *Maryland Insurance Company* by act 1795, *ch.* 60, and 1804, *ch.* 106, and the charter of *Baltimore city* continued 1798. As he made no provision for a limited time of service, he constituted *the cashier his agent* to extend the period from year to year, with the concurrence of the bank, so long as both should assent to his holding the office. If the cashier's fidelity became questionable, or his defaults known, the surety could at any time discharge himself by notifying the other party, and requesting his removal. But after standing by from the year 1814, (when the first act of assembly was published, renewing the charter,) until 1819, and seeing this cashier continuing to hold his office, and knowing that his own bond was in possession of the bank, guaranteeing the faithful service of *Higginbothom*, shall the defendant now be permitted to say that he was *not* his surety for the two last years of his service? We do not contend, that the surety is ever to be held beyond the strict scope and letter of his engagement. We admit that he is not to be made constructively liable, but we know of no case where he has been relieved in a court of law from the plain contract, because he has received no value for his undertaking. How do the cases, which will no doubt be cited on this point against us, trench upon our doctrines? They consist of three classes. 1st. Those, where there was an *express* limitation in point of time by reciting the duration of the office, or referring to the law

which limited it. And the default occurred *subsequent* to the *express* limitation in the engagement. Such are *Arlington vs Merrick*, 2 *Saund.* 412. *Liverpool Water Company vs Atkinson*, 6 *East*, 507. *Wardens of St. Saviour vs Bostock*, 5 *Bos. & Pull.* 175. *Hassell & Clark vs Long*, 2 *Maul. & Selw.* 363; and *United States vs Kirkpatrick*, 9 *Wheat.* 702. 2d. Those where the persons bringing the suit were different from those contracted with, and one or more of the plaintiffs had not been obligees of the contract, or sued for different interests; as *Wright vs Russell*, 3 *Wils.* 530; where the contract was with *Wright* as a sole trader, and he sought in that suit to charge the surety for his moiety of co-partnership loss. So in *Barker vs Parker*, 1 *T. R.* 287. The bond was to the testator for the fidelity of clerk in his service. After his death the executor carried on the trade, and sued for a loss in such distinct trade. The court very properly held it a distinct concern from the business of the testator, and that the bond did not survive to the *executor*, so as to cover defaults in *his* service. 3d. Cases of *partnership bonds*, where one partner dies or goes out, or a new one comes in. In *all* these cases, the interest that accrues after such event, is a distinct interest from the previous one which was guaranteed, and the courts have held, that the bond did not extend to a new partnership; because, the characters of the partners was an essential ingredient in the contract. Such are the cases of *Strange vs Lee*, 3 *East*, 484–9. *Pepin vs Cooper*, 2 *Barn. & Ald.* 421. *Weston vs Barton*, 4 *Taunt.* 673. *Myers vs Edge*, 7 *T. R.* 250. *Leadley vs Evans*, 9 *Serg. & Lowb.* 306. But where the bond is given to a *fluctuating body*, the change of the members does not destroy the obligation of the bond, because individual character does not enter in the consideration of the surety from the very nature of the association. The case of *corporations* is made an *express exception* from the general rules in the above cases by Lord *Ellenborough*, in *Strange vs Lee*. The same doctrine is laid down in *Medcalf vs Bruin*, 12 *East*, 399; and cases there cited. *Barclay vs Lucas*, 1 *T. Rep* 291, *(note a.) Dance vs Girdler*, 4 *Bos. & Pull.* 34, 41. *Hassell & Clark vs Long*, 2 *Maule & Selw.* 363. *Miller vs Stuart*, 9 *Wheaton*, 680; and *especially*, *Curling vs Chalklen*, 3 *Maule & Selw.*

502. One of those cases turned upon the circumstance that the bond was given to a *voluntary* association, and default occurred *after* it was *incorporated;* held, that not being incorporated, the obligees could not transmit the obligation to their *successors*, but only to their individual administrators or executors. In the case of *Barclay vs Lucas*, Lord *Mansfield* endeavoured to establish a different doctrine, but failed, although the principles he there asserts are fully sanctioned by all subsequent decisions, that if it had been a case where the bond *could* be given to the house or firm, it would continue in force as long as the house should exist. Now the only case where it *can* be *so* given consistently with the rules of law is, that of corporations whose obligations are transmitted to *successors*. But here are no successors; it is the *identical* person who sues, with whom the bond was made, the first corporate body never did expire; its life was never suspended for an instant. *Higginbothom* held in 1819 under the same appointment that he held in 1805. His commission was the same; the obligees were the same; and his duties were the same in 1819, as when the bond was given; the new law did not operate as a grant, but as a confirmation. If a temporary law be continued by another, the former statute is as if it had been made perpetual at first. *Vin. Ab.* tit. *Statutes*, 513. 6 *Bac. Ab.* 372. *Shepman vs Henbest*, 4 *T. R.* 114. A covenant runs with a corporation, though the charter be renewed. 4 *Leon.* 187, case 290. So the new body may sue for breaches as well before as afterwards. *Lee vs Waring*, 3 *Desaussure*, 70, 73. *Copley vs Delaunoy*, 2 *Ld. Raym.* 1056. *Burland vs Tyler*, *Ib.* 1391. *Lee vs Pilney*, *Ib.* 1513. *Vin. Ab.* tit. *Covenant*, 112, 416. The case of a covenant by a lessee for life to a corporation sole, to victual the *cellerer*. The corporation was dissolved, and possession given to a new body, the lessee was held bound to victual the steward of the new body; this is a case precisely in point. Finally, if the cashier be the *deputy* of the *corporation*, and his principal still lives and breathes, considers, approves or condemns, is still occupied in the same business, and in the same place, under the same charter and authority; so is his deputy in full life, vigour and health, with all his functions unimpaired. As well might we dispute the identity

of our image in a clear running stream, because the drops that reflected it a moment since are not the same that reflect it *now*, as to deny that the cashier of the *seventh* of February, 1817, was the same officer that acted that day, the hour, the moment, the *punctum temporis* before. Who can catch the last glimpse of the old charter, or the *first* of the *new?*

5. As to the plaintiffs' 2d, 3d and 6th *bills of exceptions.* 1st. *Henry Payson was a competent witness* to prove himself the depositary of the book called the By-Laws, &c. as a muniment of the bank. The case of *Rex vs Netherthrong*, 2 *Maule & Selw.* 337, is precisely in point, and in that case the interest of the witness was admitted. *Northrop vs Speary*, 1 *Day's Rep.* 23. *Peak. Evid.* 155, 169. *Moor vs Pitt*, 1 *Ventr*, 359. *Weller vs The Governors of the Foundling Hospital, Peake, N. P.* 153. The objection on the other side that he had ceased to be the depositary in May 1819, and therefore not competent, is singular, because the facts offered to be proved, occurred while *Payson* was the depositary and *Higginbothom* was cashier. He alone of course could identify the by-laws which had prescribed the cashier's duties under this bond, and, if he were a competent witness, to prove himself the depositary of this book. The decision of the county court was erroneous as stated in the plaintiffs' 2d exception; because they held him incompetent to prove *any of the matters* offered to be proved by him. 2dly. *The by-laws were sufficiently proved.* These were the rules of duty prescribed for the cashier, and under which he acted. They are proved in toto as to the cashier's duties, the only point material, by *James A. Buchanan*, by *Dunbar* and *Goldsmith*, and the *genuineness* of the book was proved by *Jona. Pinkney.* All the witnesses prove the 19th article prescribing his own duties to be in the handwriting of *Higginbothom.* The court below proceeded on the ground that a *written entry* was the *only* legal evidence of the appointment of a cashier or of the *rules of his conduct.* As this question has been discussed under the first division of the argument, it will not be repeated here. By the charter, (9th sect.) the president and directors were authorised not only to make by-laws, but such rules, orders and regulations, for the government of the officers and servants of the bank, as they should

see fit, either in writing or otherwise; and *Ridgely* guaranteed *Higginbothom* should faithfully perform such rules and regulations whether in writing or not. *John Hollins*, a former director, proves that these by-laws offered were *adopted* and *used* by the bank, although he could not identify the book; but the plaintiffs gave other evidence that there was no other book in which the proceedings of the board were entered. How could the rules of conduct be better identified and established? 3d. As to the *sixth bill of exceptions—(The admissibility of the books in evidence.)* It appears that the court below on this bill of exceptions rejected all evidence of the truth of the breaches, before the jury had found the truth of the matters of fact alleged in the *sixth* plea; the court thus assuming the question of fact, that the bond was so delivered as was stated in the plea. The opinion given on the 6th plea only ascertained what was sufficient evidence of acceptance of the bond. And the question whether it was delivered *conditionally* to await such acceptance or not, was a pure *question of fact*, and not covered by the opinion of the court. Delivery by obligor, and legal acceptance by obligee, are two distinct matters. The opinion of the court assumes that absolute delivery would not be good and sufficient, however satisfactory; that there can be no presumed assent of the obligee, but there must be *written* acceptance to make it his (the obligor's,) deed. Deed, or not, is a question for the jury. Nominal damages ought to be assessed on *all* the breaches, and if nominal, why not *real*, by the same jury that tried the issues? They had a right to find a verdict *against the direction* of the court upon *all* the issues, especially on the sixth plea, and the court had no right to reject evidence legal upon *one* issue, upon the presumption that the jury would find another issue conformably to the direction of the court which would render such issue nugatory. If the evidence offered here was admissible *before* the court had expressed its opinion on the sixth plea, it was admissible *after*. The competency of evidence does not depend upon the order in which the issues are tried; there being no legal evidence of the bond in the opinion of the court. When the *fourth* and *fifth* exceptions were signed by the court, it did not preclude the plaintiffs from offering further proof of it in a later stage of the

case. At all events, all the issues were on trial *together*, and were to be found by *the same verdict*, and the court had no right to shut out evidence to prove the breaches assigned, upon a presumption that the jury would find that there was no bond. The court decided both law and fact on the issue upon the sixth plea, in order to exclude this evidence. 4th. *As to the proof of the books.*—They are public corporation books, in which the state itself is interested to a large amount; of a corporate body so recognized as a part of the state, that some of its officers are appointed annually by the legislature, under whose direction the books are kept. The books are directed to be inspected by the treasurer of the state, and are as much public records as the books of the county clerks, surely as much as those of the bank of *England*, and other public corporations. Again, the *genuineness* of the *entries* or their *falsity*, compared with each other, was alone in issue, and not the truth of the facts which those entries professed to assert. It is one thing to offer an entry to prove the delivery of an article, or the payment or receipt of money, and quite another to prove merely the *genuineness* of the entry itself, by proving that *A. B.* or *C.* made such an entry; and that he made others inconsistent with it; so that one or the other must be false. Now, the 20th, 23d and 25th breaches assigned, put in issue the false entries by the clerks in the books, as the consequence of the cashier's neglect of duty; and the 10th and 11th breaches put in issue the charge, that the cashier fraudulently caused and permitted deceptious entries to be made in these books. *Barry vs Bebbington*, 4 *T. R.* 514. *Stead vs Heaton*, *Ib.* 669. *St. Lawrence vs Webb*, 3 *Bro. Parl. Cas.* 640. *Price vs Earl of Torrington*, 1 *Salk.* 285. *Warren vs Greenville*, 2 *Stra.* 1129. How were *these* breaches to be proved? Surely *not* by the conspirators, even if present; but by any indifferent witness who could prove these entries to be made by them, or in their handwriting—The books being the common organ of deceit between the clerks and the cashier. Besides, the conspirators, *Burt* and *Tanner*, could not have been compelled to answer, if they had been present, and *Hart* was dead. The books were not offered to prove *per se*, that *they were kept* under the superintendence of *Higginbothom*, but *that fact* was offered to

be proved as a distinct fact by *other* evidence, as well as the fact that *Jacob Hart* was dead. *All* the books were offered, because some might explain the others, and if only part of them had been offered, it would have been objected to, as only a mutilated confession, or an extract from a deed, &c. Besides, if these are to be considered *only as entries*, by the agents of the cashier acting under his superintendence, they would have been admissible in evidence; because the witnesses were out of the jurisdiction, and not within the reach of the party, and their residence unknown, so that no commission could be issued. *Nichols vs Webb*, 8 *Wheat.* 335, 336. *Owings vs Speed*, 5 *Wheat.* 423. 1 *Phil. Evid.* 169. *Finally*, the entries were evidence as *acts covenanted against* by the cashier and his surety. They both knew that the conduct of the clerks in keeping these books was subject to the cashier's superintendence. The complaint is, that he did not superintend their conduct in this respect, nor report their defaults to the board when he knew it, as was made his duty by the by-laws. We complain that he knew that the clerks made false entries in the books of the bank; that he knew that they received money with which the bank was chargeable, which they did not credit to the depositors, and that they paid out money of the bank to persons who ought not to receive it. *Barry vs Bennington*, 4 *T. R.* 514; and all this is proved by their own confessions, who were common agents between the cashier and the bank. We do not complain that he did not perform what was impossible, but that he connived at all these acts of misconduct in the clerks. In the case relied upon on the other side, (*Manhattan Company vs Lydig.* 4 *Johns. Rep.* 377,) the depositor employed a clerk *out* of his proper department, and the court held the bank liable *only in* the department where they had employed him. It is said we did not offer to prove his connivance at the false entries. The question is, whether this was not directly in issue; and if so, whether the evidence offered did not tend to prove the issue? Is a bill of exceptions to recite all the pleadings, in order to show the evidence rejected, pertinent to the issue, or will not the court inspect the pleadings to see whether such evidence offered *could* in any way *tend* to prove the issue? The by-laws proved it to be the duty

of the cashier to inspect the books: his duty was in issue, and if the books were offered *first*, were they to be rejected, because the other matters in the same issue, were not first proved? The plaintiffs had a right to prove any one of the facts in issue, in such order as they pleased, and the natural order was *first* to prove these were *false entries*, and *then* to proceed to the proof that they were with the connivance of the cashier; and *lastly*, that this was a violation of his official duty. *Upon the whole*, it is submitted to the court, that the court below erred, not only in all the points involved in the *three bills of exceptions* presented, under *this* branch of the argument, but also in the several opinions canvassed in the *two first branches* of this argument. And that, although sureties are not to be made liable *by construction*, they are not on the other hand to be relieved from the letter and spirit of their solemn engagements, upon which faith has been reposed by multitudes of helpless members of the community, whose all has been embezzled and squandered, and who have *now* left to their hopes, no other resource than those high tribunals of justice who are entrusted with the protection of their rights against lawless depredations. If sympathy is to approach the bench in behalf of the surety, is a deaf ear to be turned to the cry of the widow and the fatherless? *(a.)*

*Taney*, *R. Johnson* and *Eichelberger*, for the appellee. *1st branch of the argument.* 1. Points on the plea of *non est factum*—1st, 4th and 5th *bills of exceptions.* 1st. The amendment was not too late. The court had the right to permit it to be made at the time it was done. Act of 1809, *ch.* 153, *sec.* 1. 2d. The plaintiffs were not surprised. They did not ask time "to prepare to support their cause." There can be no error in not giving them time, when they did not desire time. 3d. The plea of *non est factum* is not inconsistent (in the legal sense of the word,) with the plea of performance. *Steph. on Plead.* 293. 1 *Chitty's Plead.* 541. *Com. Dig.* tit. *Pleader*, (E 2,) 5 *Bac. Ab.* 448. *Wright vs Russell*, 3

*(a)* The preceding Argument of the Counsel of the Appellants is intended to embrace that made by them, as well in the opening of the case, as in reply to the Arguments of the Counsel of the Appellee.

*Wils.* 536. *Peppin vs Cooper*, 2 *Barn. & Ald.* 432. *Dance vs Girdler*, 4 *Bos. & Pull.* 34. *Macclellan vs Howard*, 4 *T. R.* 194. *Jenkins vs Edwards*, 5 *T. R.* 97. 4th. The special plea of *non est factum*, does not throw the burthen of proof on the defendant. There is no issue joined on the special circumstances stated in the plea. The affirmation in the declaration, that it is the "writing obligatory," of the party, and the denial of that fact in the plea, makes the *issue* between the parties. Upon this issue the affirmation is on the part of the plaintiff; the denial on the part of the defendant. And as the plaintiff holds the affirmative, he is, according to the settled rule in courts of justice, bound to prove his allegation. In the cases of infancy, duress, usury, &c. the burthen of the proof lies on the defendant, and in those cases the plea always concludes with a verification, and the issue is joined on the matter alleged in the plea, in which issue the affirmation is on the part of the defendant, and the denial on the part of the plaintiff. See the precedents, 2 *Chit. Plead.* 464, 465, &c. In the case of *Bushell vs Passmore*, 6 *Mod.* 217, and referred to in 5 *Bac. Abr.* 373, the issue was joined on the matter alleged in the plea. The affirmation of the defendant was traversed by the plaintiff, and issue thereupon joined. On that issue the defendant held the affirmative, and the plaintiff the negative; and it is only to a case of that description that the *dictum* of *Holt* can be supposed to apply. If the issue be necessarily on the matter alleged in the plea, then the plea of delivery as an *escrow* could not conclude to the country. If the substance of the plea be the matter stated in avoidance, then, as this is new matter alleged by the defendant, the plea must conclude with a verification. For the conclusion to the country is never proper unless it follows the denial of some fact alleged on the other side. It is this affirmation on one side, and negation on the other, which makes the issue between the parties. But it seems to be well settled, that the conclusion to the country is proper in a plea of this description. 2 *Chit. Plead.* 463, *(note t,)* and the cases referred to in that note. We conclude, therefore, that the burthen of proof is on the plaintiffs. They hold the affirmative of the issue, and must prove that it is "the writing obligatory" of the defendant.

5th. It is contended that the plaintiffs have not proved that it is the deed of the defendant. The only proof on this point is stated in the *fourth* bill of exceptions; that the bond was signed and sealed by the defendant, and was found by the present cashier of the plaintiffs, in the manner described in this exception, when he entered on his office of cashier, November 16, 1819. The bond is dated March 30, 1805. There is no subscribing witness to it, and it does not, on its face, purport in the usual form, to have been "signed, sealed and delivered" by the defendant. By the charter, *sect.* 14, of the fundamental articles, it could not be the bond of the defendant unless it was accepted as such by the president and directors; and the board which accepted the bond must consist of the president and eight directors. No business but that of ordinary discounts could be done by a smaller board. *Vid.* rule 9th. It appears that there was no written evidence of acceptance by the bank. In maintaining the proposition above stated, it is insisted that there could be no legal acceptance in behalf of the corporation unless it was in writing. The president and directors are the representatives of the corporation, and could do no corporate act unless they were assembled together in the character of president and directors. The bond in question could be legally accepted only when they were thus assembled. When they are thus assembled, they have no common voice by which they may be heard to pronounce that they are satisfied with the bond, and thus evidence by words that they have accepted it. They have no common hand which can be seen to receive the paper, and thus evidence, by the act, that they are satisfied with it. Their assent, their will, cannot be evidenced in the same manner as that of an individual; and as they cannot be heard to speak, or seen when they act like an individual, it seems of necessity to follow that their acts must be proved in some other manner; that is, by writing or the common seal. Anciently, their acts could be evidenced by the common seal only; in modern times by writing, because in modern times the writing may be proved with as much certainty as the common seal. The proposition now under discussion is supported by adjudged cases as well as by sound reason. 1 *Fonb.* 305, *(note* o,*)* ed. of 1807. *Bank of Columbia vs Patterson, 7 Cranch,* 299,

305. *Fleckner vs Bank of United States*, 8 *Wheat.* 357, 358. All of these cases imply, that the corporate act must be evidenced by writing; and this is in analogy to the proceedings of all political as well as corporate bodies; whether those bodies be representative or primary, they all keep a written journal of their acts, and their decisions are evidenced by the writing only. Any other rule would be pregnant with mischief. In the *Bank of Columbia vs Patterson*, it was admitted in the case that the corporation had authorised the committee to make agreements on the subject. The manner in which such an authority from a corporation must be proved was not a question before the court. If writing is necessary to confer the power, the admission included it. When, therefore, in that case, the court speaks of the evidence of the contract, they speak of the promise of the agent, he being first proved to have been duly appointed by the corporation. The acts and promises of agents may, doubtless, be proved by parol. For although they are the agents of a corporation, yet they themselves are not a corporation. They must act, and promise, and contract as natural persons, and their contracts may, therefore, be made and be evidenced like the contracts of other individuals; that is, *by words.* It is not intended to maintain that in every case of express contracts made by the agent of a corporation, the party claiming the benefit of the contract must produce written evidence of the agent's authority. Although a corporation can neither be seen nor heard, yet in legal contemplation, it can both see and hear. And if it permits any one to hold himself out to the public as their agent in any particular business, and by its acquiescence induces a belief in the agency, the corporation, like an individual, would be bound by his acts, whether the agent was lawfully appointed or not. The law will not sanction the fraud of a corporation, sooner than that of an individual. So too in cases of implied contracts. In some of these cases the contract implied is a mere fiction of law invented for the purposes of justice. When the law implies a contract, it implies a valid contract, a legal undertaking, and consequently it must and does imply every thing that is necessary for that purpose. If a writing be necessary to evidence the contract of the corporation, the law implies the promise in writing upon the same

principle that it implies the promise by parol in the case of an individual. Both are equally fictions, and the one can as properly be implied as the other. The cases of parol agreements by the duly authorised agent of a corporation, and the cases of implied contracts, are perfectly consistent with the principles now contended for. The cases of implied contracts prove that a corporation may contract without its seal; that is, without deed; and it is on this ground that assumpsit is maintained on them. But they do not prove that such contracts need not be in writing. They do not touch that question. If, however, the court should be of opinion, that "*the satisfaction*" of the president and directors might be declared by parol, and need not be evidenced by writing, yet it is contended, that such parol acceptance must be proved to have been made by the president and eight directors duly assembled; and that the mere possession of the instrument in the manner and at the time stated in the exception, is not of itself sufficient evidence of such parol acceptance. It may be admitted for the sake of this argument, that in the case of an individual obligee his possession of the instrument is of itself sufficient evidence of the delivery without the aid of any other circumstance, provided the signing and sealing by the obligor be proved or admitted. Yet this proposition can hardly be deemed a settled one in *regard to a deed*, and is well worthy of the deliberate consideration of this court, before it is here pronounced to be a general rule of law. *Bull. N. P.* 250. *Talbot vs Hodson*, 7 *Taunt.* 251, (2 *Serg. & Lowb.* 91.)

But conceding the proposition to be true in the case of an individual, it is denied that the same rule can apply in this case. The reason of the rule would fail—1. The bond in question is declared upon as a bond dated March 30, 1805. In order to support the declaration it must be proved as a bond of that date. 5 *Bac. Ab.* 159, 160. Now in the case of an individual obligee there is at the date of the instrument a person in existence and in a condition, to accept, and no steps are necessary to be taken by him to obtain a proper attitude for receiving it, when the delivery is tendered. But in this case something more was necessary than the mere existence of the corporation. There must also have been a board convened consisting of the presi-

dent and eight directors, in order to accept this bond. There must have been a board larger in number than that required for the ordinary purposes of the bank; for the president and five directors are authorised to make ordinary discounts, which is the usual and chief business of the bank. There is no evidence that a board competent to accept was in actual existence, that is, assembled together on the day averred in the declaration; on the contrary, the minutes of the bank go to show there was no such board on that day. Yet the plaintiffs insist that the jury may, from the fact of possession in 1819, presume a delivery and acceptance on the 30th of March, 1805, without offering any evidence that, on the day last mentioned, the obligees or any body for them, were in a condition capable of accepting. *Jackson vs Phipps*, 12 *Johns.* 418, 422. 2. In the case of an individual obligee the bond cannot be delivered to him as an *escrow*. Whatever conditions may be annexed to the delivery by the obligor when he delivers it to the obligee, the bond is absolute according to its tenor the moment it is accepted into the hand of the obligee. When, therefore, the obligee is found in possession of the instrument, it is not a matter of speculation, nor even a subject of proof, whether it is an *escrow* or an absolute deed. If it came into his hands from the obligor, or by his authority, the delivery by operation of law is absolute and not an *escrow*. His possession, therefore, may be deemed evidence of an absolute delivery, because it could not come into his possession without his consent to receive it; and if he accepted, it was, when accepted, necessarily an absolute deed and not an *escrow*. In the case of an individual then, a lawful possession by the obligee is inconsistent legally with any other state of things than an absolute delivery and acceptance. It cannot, lawfully, get into his hands but as the deed of the obligor, and the law will not presume that the possession was unlawfully obtained. But in this case it is entirely otherwise. The bond may, and perhaps must, come into the possession of the president and directors as an *escrow*. It must come into the hands of the president and directors before they can pass judgment on its sufficiency; and after it is in their possession, the law makes it an *escrow* until they have declared their approval in some way. This instrument, then, may have

come into their hands originally as an *escrow;* their possession is consistent with its being an *escrow.* How, then, can that possession be evidence that it is not an *escrow*, but an absolute deed? As they would, in the ordinary course of business, obtain possession of it as an *escrow*, it would seem to follow, that it should be presumed to be an *escrow* until the plaintiffs prove that its character was changed; at all events the possession is consistent with its being an *escrow* as well as it is consistent with its being an absolute deed. The possession, therefore, cannot be evidence that it was not an *escrow*, but an absolute deed. If there was not a board to act upon it, when it was received, it would naturally and properly be placed where it was found until the board did act upon it. Indeed, it does not appear from the testimony to have been out of the possession of the cashier, who was the principal obligor; and nothing can be inferred from his acting as cashier afterwards, for it appears in evidence that he acted as cashier for more than two months before the bond is alleged to have been given. 3. There is yet another distinction between this case and a bond to an individual obligee. This instrument could not be accepted by the corporation aggregate; that is, by the stockholders themselves: it could not be accepted by agents or officers *appointed by them*, for they had not the power to make an election, as a corporation, until the first Monday in July, 1805. The persons named, or the president and any eight of them, were the agents, constituted by law to act in behalf of the corporation. It was a special authority conferred by law, and in all cases of special authority, the power given must appear in the proceedings to have been strictly followed. The chancellor is, by law, the agent of the obligee, to approve and accept for him a writ of error bond. The county court has the like authority in appeal bonds; yet it never has been supposed that such a bond, found in the custody of the officer of the court among the "archives and valuable papers of the court," was of itself evidence that it had been approved and accepted by the chancellor, or the county court, without the aid of any other circumstance. It is believed it never can be so held in the cases of writs of error bonds and appeal bonds, and this case is, in principle, perfectly analogous to these cases. It may, also, be added that in the

case of an absolute deed, or a bond for the payment of money, the party obligee or grantee being in possession, may be presumed to have accepted it, because it was for his benefit to accept it. But, in this case, unless the security was good, it was not for the benefit of the corporation to accept it, and there is nothing in the case to show that the security was good; and no argument can be drawn from the fact of *Higginbothom's* continuing to act as cashier, for it is in proof that he acted as cashier for more than two months without any bond. For aught that appears in the case, it may have been the interest of the corporation to refuse this bond and demand better security. But, conceding for the sake of the argument, that the possession is sufficient evidence that the instrument was delivered and accepted; yet it is denied that it can be evidence of the delivery and acceptance on the day it bears date, which is the day alleged in pleading by the plaintiffs, &c. to be proved by them. In the cases in which it has been held that a deed shall be presumed to have been delivered on the day it bears date, it will be found (or is to be inferred from the period at which the decision was made) that the deed upon the face of it purported to be delivered on that day. The bond, in the body of it, usually, and, indeed, always certifies, that it is sealed on that day. The subscribing witnesses certify that it was "sealed and delivered" in their presence. The old deeds, therefore, and most of the modern, bear on the face of them the evidence that they were completely executed on the day they bear date. Of such deeds it may reasonably be predicated that they were executed at the time they profess to have been executed; and it is of such deeds, it is believed, that the courts speak when they say it is to be presumed they were executed on the day they bear date. But, this instrument, although it professes to have been sealed on March 30, 1805, does not purport to have been delivered on that day; and, indeed, does not on the face of it contain any evidence that it was delivered at all. It does not, therefore, come within the reason of the rule. Again; in all of the above mentioned cases there was a body in existence and in a condition to accept on that day; and it so appeared. But, in this case, there is no such evidence; and, indeed, it would appear from the proceedings of the bank, that there was not on the 30th

of March, 1805, a meeting of the president and eight directors. Moreover, it is believed that in all of the cases in which the rule is laid down, the precise day of the delivery did not materially affect the rights and obligations of the parties. The date of the delivery was not of the substance of the contract. But, in this case the time of the delivery and acceptance is of the very essence of the contract. The whole extent of the defendant's liability depends upon the time it was accepted. The time is not less material than his signature and seal; and it would seem to be just as reasonable to presume his signature and seal, because the obligee was in possession, as to presume the precise time of delivery, in the absence of all proof as to that time. The possession itself may be considered as equivocal, for it seems to have been in the possession of the principal obligor, and in his power and under his control until 1819. The instrument in question is a common law instrument, and to be proved and established according to the principles of the common law. No argument can be drawn from promissory notes and other instruments of modern invention, which are not governed by the rules of the common law. In fine, this is the case of a surety; it is one of that class of cases in which the rights of the plaintiffs are strictly scanned and no implication or intendment made to the disadvantage of the defendant. *Miller vs Stewart*, 9 *Wheat.* 702 703. The first division of the argument, that is the points arising on the plea of *non est factum*, is here concluded. As these questions seemed to depend on the application of general principles, in the absence of adjudged cases, on the very points in controversy it was supposed that it would be more satisfactory to the court to state the argument somewhat at large. Except the case decided by Ch. J. *Marshall*, there is, perhaps, no case directly on any of the points in controversy, on this part of the subject. The other points of the case will be more briefly disposed of.

2. *As to the duration of the bond.* The points under this head of the argument arise on the demurrer to the first breach assigned in the replication to the first plea. The defendant's 1st plea is general performance. The plaintiffs reply, and assign as the first breach the embezzlement by *Higginbothom* of $50,000 on various days and times between the date of the bond

(March 30, 1805,) and the 25th of May, 1819. The defendant demurred to this breach, and the judgment of the court below was in his favour. If the breach assigned was too large, that is, if the condition of the bond did not cover the whole space of time, the plea was ill on demurrer, and the judgment of the court, therefore, right.

It is insisted that the breach assigned was too large, upon the following grounds: 1st. It is contended, that if the instrument in question be the bond of the appellee, yet he was not thereby liable as the security of *Higginbothom* for any embezzlement which took place after the first Monday in July, 1805, at which time a new election of directors took place. The charter directed that the affairs of the corporation should be conducted by the president and directors; see *sect.* 7. By *sect.* 6, the persons there named are to act as the president and directors until the first Monday in July 1805, and until a new election of directors. By sec. 8, the directors *for the time being* have power to appoint a cashier and such other officers and servants *under them* as may be necessary for executing the business of the corporation. The cashier then was one of the servants under the directors, to enable them to execute the business of the corporation. The business of the corporation was to be managed by these directors until the first Monday in July 1805, and no longer—provided the new election took place on that day. Now as the president and directors were appointed for a limited time, and to perform certain duties, and the cashier was a deputy or servant under them to aid in the performance of those duties, it is insisted that his appointment cannot endure longer than that of the appointing power. In other words, as the directors themselves had no power to manage the business of the corporation after the first Monday in July 1805, they could confer no power to do so, on any agent or servant, by virtue of their appointment. They could give no greater power to their servant, the cashier, than they themselves had. The law indeed might authorise them to appoint for a longer time, but as the law does not profess to confer such a power, the question must depend upon the general doctrine of principal and deputy. The principles above stated will be found to be established by the following cases:

*Lord Arlington vs Merricke*, 2 *Saund.* 411. *Liverpool Water Works vs Atkinson*, 6 *East*, 507. *The King vs Corporation of Bedford Level*, *Ib.* 363. *Wardens of St. Saviour's vs Bostock*, 5 *Bos. & Pull.* 175. *Hassell vs Long*, 2 *Maule & Selw.* 363. *Peppin vs Cooper*, 2 *Barn. & Ald.* 431. *Leadley vs Evans*, 9 *Serg. & Lowb.* 306. It is not necessary to enquire whether the president and directors might not so have taken the bond as to hold the security bound for a longer period. The above cases, it is conceived, abundantly show, that the bond in question cannot be construed to hold the surety liable beyond the time to which the appointment itself was limited. 2dly. But if it be even conceded, for the sake of the argument, that the above proposition cannot be maintained upon the principles and authorities above stated, yet it is insisted that the defendant was not liable for any embezzlement which took place after February 6, 1817, when the first charter expired. It may be admitted, that the defendant is liable to the new corporation, to the full extent of any contract he made with the old one, no matter whether the *breach* occurred before or after the expiration of the first charter. But it is contended that his contract could not be enlarged by the renewal of the charter. His liability as security could not be increased without his consent. It could not be made to extend to times or things for which he had not contracted. When he entered into the contract it is very clear that as the law then stood he could not be liable beyond February 6, 1817. The days of the corporation were numbered, and they ceased to exist on that day. They could, by no possible interpretation of the charter, appoint a servant for a longer period. They could have no servant after that time; for there would, as the law then stood, be no master to serve. Can a new law enlarge the liability of a surety without his consent? Is the contract to be expounded by the law as it was when the contract was made? Or, is it to be interpreted by laws passed afterwards? It is believed that the answers to these questions can hardly be a matter of doubt. And the following cases, (if cases be necessary on such a point,) it is hoped, will be deemed conclusive. *Fell on Guar.* 116, 117, *(note.) Barker vs Parker*, 1 *T. R.* 287. *Miller vs Stewart*, 9 *Wheat.* 702. *United States vs Kirkpatrick*, *Ib.* 739.

*Strange vs Lee*, 3 *East*, 490. *Dance vs Girdler*, 4 *Bos. & Pull.* 34. *Ludlow vs Simond*, 2 *Caine's Cas. in Error*, 1. The present case bears a very strong analogy to that of *Barker vs Parker*, 1 *T. R.* 287. There, a bond was given with condition that a clerk should serve faithfully, and account for all money, &c. to the obligee and *his executors*. After the death of the obligee, the executors continue the business and retain the clerk in the same employment. It was held, that the obligor was not liable for money received by the clerk in the service of the executors. Lord *Mansfield* says, "This is a very plain case. The service *in the contemplation of the parties*, was the *service of the testator*. There was no idea *then* of carrying it further." Now, in the present case the contract of the defendant was to secure the fidelity of a servant in the service of a corporation. This corporation is a legal, artificial being, depending entirely for the commencement, duration and termination of its existence upon the power creating it—the legislature. At the time this contract of the defendant was made, there was a legal statutory life assigned to this legal, artificial being. Was not then the service, *in the contemplation of the parties*, a service during the life of this artificial being, as this time was limited *at the time of the contract?* Was there any idea *then* of carrying it further? When the charter was renewed, the corporation became, with regard to the defendant in this cause, precisely like the executors with regard to the defendant in the case of *Barker vs Parker*. They were, as to him, the executors of the old corporation, retaining the same servant in the same employment.

3. *Points on Evidence*. 1. The first question under this head is presented by the plaintiffs' *second* bill of exceptions. Was *Henry Payson*, who at the time of the trial was a stockholder in the bank, and therefore to gain by a verdict for the plaintiffs, a competent witness? 1st. It is in the first place insisted that upon the general rules of evidence he was not competent to testify in support of his own interest. 2dly. It is insisted that he was not excepted out of the general rule by reason of being the depositary of the by-laws. For it appears by the exception that he ceased to be the president on the 27th of May, 1819, and consequently at that time ceased to be the deposita-

ry. 2. The second question of evidence is under the plaintiffs' third bill of exceptions, upon the admissibility of the writing offered as the by-laws of the corporation. The court refused to suffer the writing to be read in evidence as the by-laws of the corporation. It was offered as containing the written by-laws of the corporation. It is contended, 1st. That by-laws, *ex vi termini*, in modern times mean written enactments, and the power given by the charter ought to be so interpreted. The cases where they have been suffered to be proved by parol, were the cases of ancient corporations, and when the writing might be presumed to be lost. 2dly. The evidence stated in the exception does not prove *that the entire paper offered* was adopted as the by-laws of the corporation. And it was that *particular paper*, and the *whole too of that particular paper*, that was offered to be read as the written by-laws of the corporation. It is *not identified by any of the witnesses, as the paper adopted and passed by the corporation as their by-laws.* 3dly. The paper itself on the face of it, purports to be the by-laws of the *association* and not of the corporation—See *art.* 18, and *art.* 26. The parol evidence was offered to contradict the writing. If the corporation adopted similar by-laws by parol, and by-laws can be proved by parol, then the witness ought to state in words the contents of the parol by-laws. The written by-laws of the *association* could not be read as evidence of the parol by-laws of the corporation. It will be noted that the heading to by-laws is not in the book produced, and rejected by the court, as stated in the exception.

The last question is on the admissibility of the books. If the court below were right in their direction upon the plea of *non est factum*, they are then clearly right in this opinion. For it would be absurd to admit evidence to prove damages for the breach of the condition of a bond, when the bond itself was not proved—when there was no contract to be broken, and consequently no damages to be claimed for a breach. If, however, the court erred as regards the issue of *non est factum*, yet it is insisted that the said books were not admissible for the purpose for which they were offered. 1. The general superintendance and direction of *Higginbothom*, mentioned in this exception must, unquestionably, be understood to mean, his gene-

ral superintendence and direction as cashier. There is no evidence that he directed the particular entries, or even saw them or knew that they were made. The cashier's duty of superintendence is precisely like the president's, and nobody supposes that the president is responsible by reason of his superintendence, for the false entries alleged to exist in the books—*Art.* 18, 19. 2. The entire books were offered, and not particular items, and a part of the entries in the books were made by a witness still living. The relaxation of the rule as to the handwriting of an absent witness, it is contended, is confined to the single case of an instrumentary witness, and has never been carried farther. The books could not, therefore, be read unless the living witness was called to prove his entries, and for the best reason—because he would be able to explain why they were made. *Cooper vs Marsden*, 1 *Esp. Rep.* 1. 3. The books were offered, not only to show that they contained false entries and omissions; but also, to prove *by the books* that such false entries, &c. occurred therein by the neglect and fraud of *Higginbothom.* Now, although the books might show false entries and mistakes, they could not show that they occurred by the fraud or neglect of *Higginbothom;* and being offered for a purpose for which they were clearly incompetent, they were properly rejected by the court. They could not, in any view of the subject, be evidence to charge the defendant, unless they were coupled with an offer to prove, that the entries spoken of were occasioned by his neglect of duty, or that he knew their falsehood, and connived at it—no such proofs are offered; the books are offered *by themselves, and it is not even said that it was the duty of Higginbothom to inspect them.* 1 *Starkie*, 50, 51, 305, 306. 2 *Starkie*, 41 to 47, 401, 403, 406. 3 *Starkie*, 1300, tit. *Res inter alios.* If the cashier could have performed his duty, and yet these false entries have been made, the court will presume that he did perform his duty; they will not presume fraud. The case of the *Manhattan Company vs Lydig*, 4 *Johns. Rep.* 377, shows that when ordinary and legal diligence was used by the bank, still such false entries may occur, which might have been prevented by extraordinary diligence. And when it is stated, as it is in that case, that the *bank* was not bound to use any extraordinary diligence

to detect and prevent the false entries of its book-keeper, it necessarily follows that the cashier was not bound, he being the principal officer of the bank, and the bank being clearly responsible for any omission of duty on his part. It is, also, to be remarked that *Spencer*, J. in delivering the opinion of the court in the above cited case, observed, that the bank had pursued the usual and uniform method, and could not be subjected to the charge of negligence, which they certainly would have been had it been the duty of the cashier to exercise such extraordinary diligence as would have enabled him to discover the false entries of the book-keeper. The truth is, and every body, in the slightest degree acquainted with such matters, knows, that the exercise of such a degree of diligence on the part of the cashier, would be utterly incompatible with a faithful performance of the ordinary and important duties of that officer. It is scarcely considered necessary to assign any reasons why the books are not admissible, in this case, as the books of a corporation. It will be perceived, by the court, that all the elementary writers on the subject, of the most approved authority, lay down the rule broadly, that the books of a public corporation are only evidence as between the members, and not as between the corporation and a stranger. By *stranger* is meant any one who is not a *member* of the corporation. In the present case, every one is a stranger who is not a stockholder in the bank. The cashier, *as such*, is not a member of the corporation. He may be a stockholder, and thus a member of the corporation, and the books might, for some purposes, be evidence against him. But it would be in his character of *stockholder*, and not in his character as cashier, in which he is as much a stranger, as to this point, as if he had never been within the walls of the banking house. *Starkie on Evidence*, 297 to 300. *Philips*, 319. This is *a fortiori*, true with regard to the surety of the cashier. Upon a view, therefore, of the whole case, it is submitted that the judgment of the county court, on all the points. was right, and ought to be affirmed.

*Curia adv. vult.*

BUCHANAN, Ch. J. at the present term, delivered the opinion of the court. At the trial of this cause in the court below, *six* bills of exceptions were taken on the part of the plaintiffs, upon which this court is called on to decide. The suit was instituted upon an instrument of writing, purporting to be a bond, executed on the 30th of March, in the year 1805, to the plaintiffs, by *Ralph Higginbothom*, in the character of cashier of the institution, as principal, and the defendant and others, as his sureties. The declaration is in the usual form of debt on bond. The defendant, among other pleas, pleaded in the first instance general performance. The plaintiff replied, assigning various breaches, and several issues were joined, both of fact and in law, to which it is not necessary here to advert. In this state of the pleadings, the cause was continued by consent from term to term, with leave to the parties to amend their pleadings, until the term at which it was tried, when the defendant, by his counsel, asked leave of the court to amend his pleadings, by filing a special plea of *non est factum*, which was objected to by the counsel for the plaintiffs. But the court overruled the objection, and permitted the defendant so to amend his pleadings; which forms the subject of the first exception.

The grounds of objection to the plea being received at that stage of the cause, are—*First.* That it came too late. *Second.* That it is inconsistent with the defendant's plea of general performance, and other pleas; and *Thirdly.* That it is against the *eleventh* and *thirty-third* standing rules of that court.

As to the *first* of these grounds, it might be sufficient to observe, that it is a general issue plea, and like other general issue pleas, need not be pleaded before the rule day, but may be received when the cause is called up for trial, and did not therefore come too late in this case. In addition to this, it is not at variance with the *eleventh* rule of the court, which expressly provides, that "the general issue plea may be pleaded by the defendant at any time before judgment by default is entered against him, although he hath not pleaded before the rule day;" and also that "it will never be considered as a reason to delay the trial." And by the act of assembly of this state of 1809, *ch.* 153, *s.* 1, it is declared, "that the courts of law shall have power to order and allow amendments to be made in all pro-

ceedings whatever before verdict, so as to bring the merits of the question between the parties fairly to trial; with the further provision, that "in all cases where amendments are made, the adverse party shall have time to prepare to support his case; but the case shall not be continued to the next term, unless the court shall be satisfied that the same is necessary." That the court then had authority to permit the amendment objected to, so far as concerns the time at which the plea was offered, is unquestionable. And the argument directed against that authority, drawn from the supposed surprise and hardship on the plaintiffs, would be more applicable to an objection to the forcing a plaintiff in such a case into an immediate trial, which is not presented by any thing appearing in this record; the question arising on this bill of exception, not being whether the plaintiffs were improperly forced into the trial of the cause at that time, but whether the plea was properly received. Besides, under the 11th rule referred to of the court, the filing a general issue plea, when a cause is called up for trial, is not of itself a cause of continuance. And although by the act of 1809, *ch.* 153, when an amendment is made at the trial, time is to be given, during the term, to the adverse party to prepare to support his case; yet the cause is not therefore to be continued, unless the court shall be satisfied that a continuance is necessary. And there is nothing to show, either that a continuance of the cause, or time to prepare to support their case, was asked for in behalf of the plaintiffs, and refused by the court, or that they were forced into an immediate trial unprepared; on the contrary, the record exhibits an objection only to the plea being received, and that, on the three grounds stated in the bill of exceptions, that it came too late, was inconsistent with the defendant's other pleas, and against the 11th and 33d rules of the court. Moreover, the cause appears to have been continued from term to term for several terms, to that at which it was tried, not under a rule on either party, but by consent, with leave generally to the parties to amend their pleadings; so that in receiving the plea, there was no surprise or hardship on the plaintiffs to be complained of.

But if it rendered a continuance of the cause, or further time to the plaintiffs during the term, for preparation, necessary,

which continuance or time was an application refused by the court, an objection would more properly have laid to such refusal.

The *second* ground of objection. The incompatibility of the pleas of general performance and *non est factum*, is equally untenable. Whatever apparent inconsistency there may be between such pleas, it is not of a character to prevent their being received; and such has been the practice of permitting them, under the construction of the statute, 4 *Ann, ch.* 16, that it may now be considered a settled rule or law of pleading.

To confine the defendants to pleas strictly consistent, would be greatly to narrow the benefit of the statute; as a special, and a general issue plea, could in such case, seldom, if ever, be pleaded, the latter always denying, and the former generally confessing and avoiding the charge. And as the statute itself makes no such distinction, it is not by construction limited to strictly consistent pleas; but the chance is given to the defendant of succeeding, not only on the strength of his own case, but on the weakness also of the plaintiffs, by permitting apparently incompatible pleas to be pleaded—as not guilty, and accord and satisfaction; not guilty, and *son assault demesne;* not guilty, or *non assumpsit*, and the statute of limitations; *non est factum* and payment; *non est factum* and general performance, &c. Hence the common form of pleading such pleas, to be found in the most approved books of entries, and the many cases in the books of reports in which they have been received. Of which the case similar to this in *Wright vs Russell*, 3 *Wils.* 536, may be taken as an apposite example; where after the pleas of *non est factum* and performance, judgment was given for the defendant on his demurrer to the plaintiff's replication.

*Non assumpsit*, or *non est factum*, and a tender, are not permitted to be pleaded, on the ground, that one goes to deny the existence of any cause of action, and the other admits it; and that if the general issue should be found for the defendant, it would appear on the record in the action of *assumpsit*, that no debt was due, in the face of the defendant's admission by the plea of tender, that something was due; and in the action of debt, that there never existed such a bond as that declared on, when the plea of tender admits something to be due on that

very bond. *Maclellan vs Howard*, 4 *T. R.* 194. *Jenkins vs Edwards*, 5 *T. R.* 97. But the pleas of general performance and *non est factum*, though apparently inconsistent, cannot produce on the record the same incongruity, both going to deny the plaintiff's whole cause of action. And the general issue and a tender, are the only pleas that are now disallowed on the mere ground of inconsistency; (1 *Chitty's Plead.* 541, 542. *Step. on Plead* 293, 459;) unless it be by the 33d rule of the court, that seems to have been relied upon, declaring "that no incompatible pleas shall be received;" but which is certainly at variance with the well established practice on the subject of pleading, and inconsistent with that due exercise of discretion, which is required of the courts of this state by the act of 1809, *ch.* 153, giving them power "to order and allow amendments to be made in all proceedings whatever before verdict, so as to bring the merits of the question between the parties fairly to trial;" since under that rule (if of binding authority,) a plea necessary to the bringing the merits of the question between the parties fairly to trial might be excluded.

The discretion vested in the courts by that act, is not a capricious, but a sound legal discretion, to the proper exercise of which the party claiming it is entitled, and from which he cannot properly be debarred, by any rule that is the mere creature of the court; and the permitting the amendment proposed in this case to be made, was, we think, a proper exercise of that discretion, according to the spirit and intention of the acts, and the settled practice, in relation to the pleading a special and general issue plea, although apparently inconsistent, notwithstanding the 33d rule, which was properly dispensed with.

The questions presented by the *second* and *third* bills of exceptions taken by the plaintiffs, arise on points of evidence. The *first* as to the competency of a witness produced on the part of the plaintiffs; and the *second* on the admissibility of a writing, headed "By-Laws," which was offered to be read on the part of the plaintiffs, as and for the by-laws of the corporation, under which the president and directors acted, and as prescribing, among other things, the duties of *Ralph Higginbothom* (the principal in the bond,) while he was in their employment as cashier. *Henry Payson*, the person produced

as a witness, being proved to be a stockholder in the bank at the time of the trial, his testimony was objected to, for any purpose but to prove himself a stockholder; and rejected by the court on the ground of interest.

It is admitted, upon general principles of evidence, that in a suit brought by a bank, one who is a stockholder, and interested in the event of the suit, is not a competent witness in behalf of the institution. But that general rule is not without exception; for though an interested corporator cannot be received to testify generally for the corporation, yet it does not therefore follow, that he is competent for no purpose; but he may be placed in a situation to render him a necessary and competent witness for some purposes. Of which the case of *The King vs The Inhabitants of the township of Netherthong*, 2 *Maul. & Selw.* 337, is an appropriate example, where a rated inhabitant of the township of *Netherthong*, whose interest was admitted, was called by the respondents, and was held to be competent to give evidence as to the custody of a certificate from the township of *Honley*, (which was produced,) acknowledging the pauper's grandfather and father to belong to *Honley*, in accordance with the decision in another case, that was mentioned by Lord *Ellenborough*.

*Payson* being a stockholder in the bank, was not a competent witness for the plaintiffs for all purposes; but he was offered to prove, among other things, that he was the president of the bank from the 27th of April 1812, until after the 27th of May 1819; that as such, he was the depositary of the bank; and that during the time he was president, a certain book called the By-Laws, was one of the books of the bank. And if an interested corporator is competent to give evidence in behalf of the corporation, as a depositary of the muniments, in relation to his custody, of a paper produced as one of the muniments, why was not *Payson* within the exception to the general rule, and competent to prove himself the depositary of the book called the By-Laws, as a muniment of the bank? The only argument urged against his competency, as being within the exception is, that at the time he was called as a witness, he appears from the plaintiffs' own offering to have ceased to be the depositary. But that, it is conceived, makes no difference, and that he was

a competent witness to identify the book as a muniment of the bank, during the time that he was the despositary, *Higginbothom*, too, then acting as the cashier, and being a witness for that purpose, that he ought not to have been rejected as incompetent to prove any of the matters for which he was offered.

He was not competent to prove that it continued to be one of the books of the bank, after he had ceased to be the depositary, and when he stood only in the relation of a stockholder in the bank, any more than any other stockholder. But admitting the existence as to depositaries, of the exception to the general rule of evidence, no reason is perceived, why his having ceased to be the depositary at the time he was called as a witness, disqualified him from proving the book produced to have been a muniment of the bank, while he was the depositary; the nature of his interest as a stockholder not being changed, but remaining the same as it was, while he continued to be the depositary.

The objection to the admissibility of the writing headed "By-Laws," is, that they purport, upon the face of them, to have been the by-laws of the banking association, styled "*The President and Directors of the Union Bank of Maryland*," when the business was transacted under the articles of association, and before the act of incorporation, and that they do not sufficiently appear to have been adopted by the corporation as their by-laws."

By the *ninth section* of the charter the president and directors, for the time being, are authorised to make all such rules, orders, by-laws and regulations, for the government of the corporation, its officers and servants, as they, or a majority of them, from time to time may think fit, and the same at pleasure to revise, alter and annul. It may here be admitted, that the charter contemplates written by-laws; and then the question is, whether these are the written by-laws of the corporation?

They are in writing, and if they were ever adopted by the president and directors, or a majority of them, as by-laws for the government of the corporation and its officers, they became, by such adoption, the written by-laws of the corporation. It appears from the statement of the evidence, that the book marked *By-Laws*, from which the writing objected to was offered to

be read, was one of the books of the corporation, and that, in which the proceedings of the president and directors were entered, from the time the charter was obtained, until the year 1819, so far as they were reduced to writing, and that there was no other book, in which their proceedings were entered during that period, nor any other writing or memorandum of their proceedings. One of the witnesses, the cashier who succeeded *Higginbothom*, in the year 1819, and after other by-laws had been adopted, proves, that when he went into the bank, he found the same book among the other books of the corporation, and that it had in bank the reputation of being the former by-laws and minutes of the corporation. If then there were any by-laws of the corporation, they were contained in that book, and were they that were offered to be read, and were rejected by the court—there were none other.

It is contended, 1st. That there is no evidence that the entire writing, headed "By-Laws," was adopted as the by-laws of the corporation. And 2d. That there does not appear to have been any entry or memorandum of such adoption, among the minutes of the proceedings of the corporation.

As to the *first* of these positions. The writing, headed "By-Laws," consists of 26 articles, the witnesses who were examined in relation to their adoption, had each of them been a director under the charter, except two who had been clerks; and the proof is, that the 19th article prescribing the duties of the cashier, which, in truth, is all that is material in this part of the case, was required by the corporation to be particularly observed; and that *Higginbothom*, acting as the cashier, after the act of incorporation, was in the habit of observing, or of professing to observe it, but that he did not perform the duties with regularity. With regard to the rest, several of the witnesses, taking their testimony together prove, that the government and proceedings of the bank were in conformity with all of them, with the exception only of the 20th and 23d, concerning which they have no distinct recollection, and which have no relation to the duties of the cashier; some, that the direction and government of the bank was in general in conformity with them; one, that when he was elected a director, in 1817 or 1818, he inquired for the by-laws, and that a book or paper

was delivered to him by an officer of the bank, containing by-laws similar to those in question; that he remembers them, among other things, from the fact, that questions sometimes arose at the board, as to what were the rules in particular cases, which were decided agreeably to the by-laws offered to be read; and because the regulations and government of the bank corresponded, while he was a director, and until other by-laws were adopted in 1819, with the system prescribed by the articles, headed "By-laws." And another, that when he was sworn in as a director, between the years 1806 and 1811, or about that time, certain by-laws were handed to him, as proper to be read by him as a director; but does not prove that these are or are not the same; and it appears that all the articles, headed "By-Laws," and many of the minutes entered in the book, entitled, "By-Laws," which was kept by *Higginbothom*, as cashier, were in his handwriting. This is the substance of the material part of the oral testimony stated in the *third* bill of exceptions, and it seems to us to be quite sufficient to show a practical adoption by the corporation of the articles, headed "By-Laws."

As the book, in which they are written, was one of the books of the corporation, and the only book in which any of the proceedings of the president and directors were entered, from the time the charter was obtained until 1819, and as there was no other writing or memorandum of their proceedings, it was necessarily the book that was put into the hands of the two witnesses, when they first went into the bank as directors. And what circumstance could be stronger to show, that the writing or articles, headed "By-Laws," had before been adopted by the corporation as such, than the delivery of the book containing them, by one of its officers, to a newly appointed director, on his inquiring for the by-laws, and their being handed to another, on the occasion of his being sworn in, as proper to be read by him as a new director? The testimony of each of those witnesses goes to the whole writing, and not to any particular article. It was put into their hands to read, as containing a system of by-laws, not confined to one portion more than another, but embracing all the articles of which it consists. And although they do not identify the writing pro-

duced, by swearing it is the same which they saw in the bank, and of which they speak; yet its identity is sufficiently established by the proof, that the book containing it was a book of the corporation, in which the proceedings of the president and directors were entered until the year 1819, and that there was no other in which any of their proceedings were entered, nor any other writing or memorandum of their proceedings before that period. The testimony then of these witnesses, clearly relates to the articles headed "By-Laws," and evinces the understanding at the bank upon the subject, and the light in which they were viewed. And the proof by some of the witnesses, that the direction and government of the bank was generally in conformity with the system they presribe; by one, that the regulations and government of the bank, corresponded with them as a system, and that they governed the decision of questions, which occasionally arose as to what were the rules in particular cases; by some that the proceedings and government of the bank were in conformity with 24 of the 26 articles, particularly in the recollection of the witnesses; and by some, that the 19th article was required by the corporation to be particularly observed, and that *Higginbothom* himself, acting as the cashier, professed to observe it, form together a mass of evidence relative to the acts and general government of the corporation, conclusive of their adoption as a system, and not of particular articles merely, if they could be adopted otherwise than by writing. They were treated and acted upon as a system, and there is nothing to show that they were partially adopted only, or that any particular articles of that general system were excepted.

But it is supposed, *secondly*, That an entry or memorandum in writing was necessary to their adoption by the corporation. No reason has been shown in argument, nor can we perceive any, why their adoption may not be proved, as well by the acts and uniform course of proceeding of the corporation, as by an entry or memorandum in writing. They were originally the by-laws of an association, and an entry or memorandum would have been evidence only as an act of the corporation of their adoption; and, without the common seal, which was once held to be necessary to every act of a corporation aggregate, could

no more unite the several assents of the individuals composing it, so as to make it the act of the corporation, than any other act without the common seal.

But it is admitted, that a corporation aggregate may *now* act without its common seal; and if so, why may not the adoption by such a corporation, of a set of written rules, (already prepared by others,) as and for its by-laws, be evidence otherwise than by writing? Where is the law substituting writing for the common seal, and declaring it to be necessary in all cases? If there is any act of a corporation that need not be in writing, it would seem to be such an act of adoption; not being a contract, but a recognition only, of certain written rules for its own government, and that of its officers and servants, which, when adopted, whether by writing or otherwise, become its written by-laws, speaking the sense of the corporation; and it does not appear to be material, in what manner, or by what acts, its assent to them is manifested, assuming that it need not be evidenced by the common seal.

In this case authority to make by-laws is specially delegated by the charter to the president and directors, without any direction as to the manner in which it is to be done. And if in the exercise of that authority, as the agents (under the charter,) of the corporation, they could adopt as rules for its government, the written by-laws of the former associations, which is not denied, it was no more necessary to be done in writing, than the acts of any other duly appointed and authorised agents. And it will not be contended, that an agent, duly authorised and appointed by a corporation, can only act or contract by writing.

But authorities are not wanting to sustain the position, that acts or contracts of corporations may be proved otherwise than by writing, and may be inferred from other corporate acts; two only of which will now be noticed, which are we think conclusive upon this point of the case. *The Bank of Columbia vs Patterson's Adm'rs.* 7 *Cranch*, 299, and *Whittington vs The Farmers Bank of Somerset and Worcester*, 5 *Harr. & Johns.* 489. *The Bank of Columbia vs Patterson's Adm'rs.* was an action of *assumpsit*, by *Patterson's* administrators, for work and labour done by their intestate, for the bank, growing

out of a sealed agreement between *Patterson*, and an authorised committee of the directors of the bank, in their own names. There was no entry or memorandum in writing produced, of the adoption by the corporation of the contracts of the committee, nor of any vote for the payment of the money. But it appearing that the corporation had from time to time paid money on the contracts to the intestate, and that they were for the benefit of the corporation, the court said the jury might from that evidence "legally infer, that the corporation had adopted the contracts of the committee, and voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted the engagement." And in *Whittington vs The Farmers Bank of Somerset and Worcester*, it was decided by *Worcester* county court, and on appeal affirmed by this court, that it was not necessary an order of the president and directors should be in writing to give it validity, but that it might be proved, if not reduced to writing, by oral testimony.

But the proof in this case of the adoption by the corporation of the writing produced, as its by-laws, does not rest entirely on oral testimony. There is among the minutes of the proceedings, which were produced, a written recognition of them in these words: "Whereas by an act to incorporate the stockholders in the *Union Bank of Maryland*, it is among other things enacted, that an election for sixteen directors to conduct the affairs of said bank, shall be annually held on the first Monday in July: And whereas the said first Monday in July may sometimes fall on the fourth of said month, on which the bank will be shut agreeably to the provisions of the fourth article of the by-laws, ordained and passed for the regulation and government of the said corporation," &c. Now that this entry relates to the writing or articles headed "By-Laws," and could have related to nothing else, is manifest, not only from what has been already said, and the proof that there were no others, but also from the language of the fourth article itself under that heading; which is in these words: "That the bank shall keep open for ordinary business, from nine o'clock in the morning till three o'clock P. M. every day, except Sundays, Christmas day, and the fourth day of July;" providing, as stated in the

entry, for the bank being shut on the fourth of July. It is not indeed a resolution of adoption, nor the act by which they were adopted and made the by-laws of the corporation, but an acknowledgment that they had been previously adopted and made, and were then the by-laws of the corporation. It will bear no other construction, and it may be likened to the case of *Fleckner vs The United States' Bank*, 8 *Wheat.* 338, where a resolution passed by the president and directors of the Planters Bank of *New-Orleans*, declaring that an endorsement which had before been made of a note by its cashier, was made by the authority of the president and directors, and ratifying the act of the cashier, was held to be not a mere ratification of the transfer, but a binding acknowledgment of its original validity. As here, the subsequent entry is an acknowledgment of a previous adoption, not of a part only, but of the whole writing as a system of by-laws, which are declared to have been ordained and passed, for the government and regulation of the corporation. Besides they are set out in the replication, and alleged to be the by-laws of the corporation, and violations of them, so far as they prescribe the duties of the cashier, are assigned as breaches; on which breaches issues are tendered by the defendant, and joined by the plaintiffs; so that they are virtually admitted by the defendant in his pleadings.

Two questions arise on the *fourth* and *fifth* bills of exceptions, growing out of the special plea of *non est factum*. 1st. Whether, there being no written acceptance produced, of the instrument on which the suit was brought, there was other sufficient legal evidence, from which the jury might have inferred that it was duly delivered by the defendant, and accepted by the plaintiffs; which is presented, both by the *fourth* bill of exceptions, and the *first* prayer of the plaintiffs in the *fifth* bill of exceptions. The 2d. Whether the plea, that the supposed writing obligatory was delivered as an *escrow*, imposed upon the defendant the burden of proving the special matter alleged in the plea; which arises on the *second* prayer of the plaintiffs in the *fifth* bill of exceptions, and will be first examined.

It is a general principle of pleading, that where a plea produces a direct affirmative and negative, by denying the allega-

tion in the declaration, it should conclude to the country, whether the affirmative of the issue is held by plaintiff or defendant, and that the proof of the affirmative rests on him who asserts it. But when new matter is introduced on either side, the pleading ought to conclude with a verification. Thus, in the application of these rules, the plea of general *non est factum* in an action of debt on a bond, which, by denying the allegation in the declaration that it is the writing obligatory of the defendant, makes the issue between the parties, concludes to the country, and throws the whole proof of the execution of the bond, including the delivery, upon the plaintiff, who in that case asserts the affirmative.

But the defendant may, under that issue, give in evidence any thing which goes to show that the instrument of writing was originally void at common law, as lunacy, fraud, coverture, &c. or that it had become void subsequent to the execution, and before the bringing of the suit, as by erasure, alteration, &c. because the plea of *non est factum* puts in issue as well its continuance as a deed, as its execution; and it is enough if it was not his deed at the time of pleading. Or the defendant may plead any such special matter. But if he chooses to do so, being new matter, he must do it with a verification, and holding the affirmative, he draws the burden of proof upon himself. So if he seeks to avoid the bond, for duress, infancy, usury, &c. which cannot be given in evidence under the general issue, (the bond not being therefore absolutely void, but voidable only,) he must plead such new special matter with a verification, and the proof lies upon him. In every such case the issue is upon the matter specially alleged in the plea.

That the defendant may give in evidence, under the plea of general *non est factum*, that the instrument of writing was delivered as an *escrow* on a condition not performed, is every where to be found; and it is equally will settled, that he may plead it specially, and that the proper conclusion to that plea is to the country; because it is a special negative to the affirmative in the declaration—the allegation in the declaration, that it is the writing obligatory of the defendant, including the allegation of the delivery of it as a deed; and it is this conclusion

to the country that raises the question, whether the proof is on the plaintiff or defendant

In *Bushell vs Pasmore*, 6 *Modern*, 218, it is said by *Holt*, Ch. Justice, that "all these special *non est factums* in case of *escrow*, erasure, &c. are impertinent, for thereby the defendant brings all the proof upon himself; whereas by pleading *non est factum* generally, he would turn the proof, of whatever is necessary to make it his deed, upon the plaintiff;" thus making no distinction between the different pleas of special *non est factum* as to the burden of proof. And in 2 *Stark. Evid.* 482, the same broad position is laid down, that "where the plea is *non est factum* generally, the proof is upon the plaintiff; but where the plea shows that the deed is void for special matter, the issue is on the defendant," with a reference to the case of *Bushell vs Pasmore*. This writer then, adopts as a rule of evidence, the doctrine asserted in *Bushell vs Pasmore*, that in all cases of special pleas of *non est factum*, without any distinction, as *per fraud*, lunacy, delivery as an *escrow*, erasure, &c. the proof rests on the defendant.

The position laid down by *Holt* in *Bushell vs Pasmore*, is translated into 5 *Bac. Ab.* 373, with a marginal *quere*, as to the case of an *escrow*. We have seen it no where denied; and the force of that *quere*, is much weakened by the reason there given for it, "for it is his deed though delivered to another on condition." Now in such case, the instrument is not delivered as a deed on condition, but given to another as an *escrow*, to be by him *delivered as a deed* to the obligee, on a condition precedent. And it is only on the ground, that it is not his deed, that the defendant can give it in evidence under the plea of general *non est factum*. The plea of *escrow* admits the signing and sealing only, but denies the delivery as a deed, which makes an issue between the parties; and the conclusion being properly to the country, the plaintiff has no choice but to add the *similiter;* and the conclusion, &c. "and so," &c. being a conclusion of law, and not issuable, the issue is upon the whole plea; and the question for the jury is a question of fact, whether it was delivered as a deed, and that depending upon the truth of the special matter alleged in the plea, which if not pleaded, the defendant could only avail himself of by

proof. And what is there in the pleading the same matter that dispenses with the proof, and imposes upon the plaintiff the necessity of disproving it? It is but the assertion of the defendant in the shape of a plea, and cannot avail him, if unsustained by proof, any more than any other special matter alleged in avoidance, or which shows, if true, that the instrument of writing was originally void at common law, as for fraud, coverture, &c. or that it had become void subsequent to the execution, and before the bringing of the suit, as by erasure, &c. which it is incumbent upon the defendant alleging it to prove—every thing necessary on the part of the plaintiff, the signing, sealing and delivery being admitted, and the issue being upon the matter specially alleged in the plea. So where the delivery as an *escrow* is pleaded, the issue is upon that special matter; which being alleged and relied upon by the defendant to show that it is not his deed, the proof of that allegation (he holding the affirmative,) rests upon him. And if there be no proof on the part of the defendant, the possession of the instrument by the plaintiff, is *prima facie* evidence of the delivery as a deed, which is all he has to show, and is sufficient to sustain the issue on his part—the signing and sealing being admitted, and the delivery as a deed, being the only matter in issue between the parties, upon the special allegations in the plea. And the plaintiff is not driven to any further, or stricter proof of the delivery, than such as is held to be sufficient under the plea of general *non est factum*. When it is said, that the special pleas of *escrow*, erasure, &c. throw all the proof upon the defendant, it is only meant, in relation to the special matter that is alleged, as operating to do away the effect of what is admitted, to wit, the signing, sealing and delivery, in the cases of erasure, &c. and the signing and sealing, in the case of *escrow*, but not the delivery as a deed, which is not admitted. Therefore, if the delivery as an *escrow* be proved on the part of the defendant as alleged in the plea, the proof of the performance of the condition lies upon the plaintiff where the affirmative is with him.

In this view of the plea of *escrow*, if this was the case of any individual plaintiff, we think, in the absence of all evidence on the part of the defendant, the possession and production of the instrument of writing by the plaintiff, would be sufficient *prima*

*facie* evidence of the due delivery and acceptance, to entitle him to a verdict, on the issue joined upon the *sixth* plea. But being the case of a corporation, it is supposed to differ from the case of an individual; and that the possession and production of the instrument by the plaintiffs, is not sufficient legal evidence of the delivery and acceptance as a deed, without some entry or memorandum in writing of such acceptance. Which leads to the inquiry, whether a written acceptance is essential to the validity of a bond executed to a corporation; and that involves the consideration of the question arising on the *fourth* bill of exceptions, and the *first* prayer in the *fifth* bill of exceptions.

It is contended that a written acceptance must be produced; that nothing else will suffice; and that no other facts or circumstances, however conclusive they might be in the case of an individual, can be received to raise a presumption in favour of a corporation, of its corporate assent, or from which its adoption or acceptance can be inferred, on the broad ground, that a corporation aggregate is incapable of doing any act except by writing.

But is it true that a corporation is incapable of doing any act that is not evidenced by writing? It seems to have been formerly held, that a corporation aggregate could only act by its common seal, could do nothing without deed. But that doctrine is now no where sanctioned as a universal proposition. It has long since been held, that such a corporation may employ one in ordinary services without deed, as a cook, butler or servant, and may appoint a bailiff to distrain, without deed or warrant. 2 *Bac. Ab.* tit. *Corporation*, (E. 3,) 13. 3 *Lev.* 107. *Anon.* 1 *Salk.* 191. And in *Harper vs Charlesworth*, 4 *Barn. & Cress.* 575, Mr. Justice *Bayley* said, "a corporation can only *grant* by deed, yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a bailiff, and do other acts of the like nature." And it is now well settled, that it may be bound by a promise express or implied, arising from the acts of its agent, appointed and authorised by a corporate vote only, unaccompanied by the common seal.

It is said by different writers, treating of the manner in which corporations aggregate may act, that "gifts by and to them must be by deed." That "in general a corporation aggregate

cannot take, or pass away any interest in lands, or do any act of importance without deed," &c. But conceding that anciently a corporation aggregate could do nothing but by deed, we have seen, that in more modern times the rule has been broken in upon, in the language of *P. Williams* in his argument in *Rex vs Biggs*, 3 *P. Wms.* 423, "for conveniency's sake." And in that case, which was an indictment for erasing an endorsement on a bank note, there being a special verdict, finding the prisoners guilty of the erasure, and that the note was made and signed by one *Joshua Adams*, who was entrusted and employed by the bank of *England* to sign bank notes, but not under the common seal, it was elaborately argued by *P. Williams*, that the appointment of *Adams* was not valid, because not made under the common seal of the corporation; and also strongly urged from the importance of the trust, and not being an ordinary employment, that if in any case whatever, an authority given by a corporation ought to be under its common seal, it was that. The prisoner, however, was condemned, and the appointment of course held to be valid. It does not appear whether the appointment of *Adams* was or not by writing, but it was without deed, it was not under the common seal of the corporation; and it was not a small matter, nor an appointment on ordinary service, but of an agent, employed in an important trust, and the decision too, was in the case of felony, involving the life of the accused. If it be treated as an appointment in writing, for which the case, neither as reported in *Strange* 18, nor *P. Williams*, furnishes any sufficient warrant, it shows, that the old doctrine, that a corporation aggregate must in all things act by its common seal, and can do no act of importance without deed, is no longer regarded, that being a case of the appointment without deed, of an agent to an important trust, connected with the highest interests of the corporation; and if considered as an appointment not evidenced by writing, it is a decision very strongly applicable to this case.

It is unnecessary to multiply cases to show, that the acts of corporations may now be evidenced by writing without seal—that is fully admitted; but it is strongly urged, that although they may now act without deed, yet that their acts cannot be evidenced otherwise than by writing. And for that we have

been referred to 1 *Fonb.* 306, *(note o.)* *The Bank of Columbia vs Patterson's. Adm'r.* 7 *Cranch,* 299, and *Fleckner vs United States Bank,* 8 *Wheaton,* 338; but they do not support the position. In the note in *Fonblanque* it is said, "and the agreement of the major part of a corporation being entered in the corporation books, though not under the corporate seal, will be decreed in equity." The only ground upon which such an agreement can be enforced, is the capacity of a corporation to make a contract without seal, contrary to the ancient doctrine. But it is not there said, that a corporation can make no agreement, nor do any act except by writing; nor does the inference appear to be a ready one, that an agreement not in writing, or not entered upon the corporation books, cannot be enforced. And opposed to such an inference, is the case of *The King vs The Inhabitants of Chipping Norton,* 5 *East,* 239; where a corporation at a court leet, let certain tolls belonging to the corporation by a verbal agreement; and it was held, that the corporation could not pass the tolls by a verbal demise, but that it was a license to collect the tolls, and might be a ground on which to apply to a court of equity. The principle there decided, was not that the verbal agreement was a nullity, but only that it did not operate at law to pass the interest in the tolls, which could only be demised by deed; yet that it bound the corporation as a license, and was a contract or agreement fit to be enforced by a court of chancery. In *The Bank of Columbia vs Patterson's, Adm'r.* the court takes notice of the ancient doctrine, that corporations could do nothing without deed. But says, they may now "by mere vote, or other corporate act not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation." Now to say, that a corporation may "by a mere vote or other corporate act," appoint an agent, is surely not to say, that it can only appoint an agent in writing, as a vote need not of necessity be reduced to writing, and "other corporate act," are very indefinite terms, and would rather seem to imply any act, whether in writing or otherwise; and the term "mere vote," would seem to import a naked vote, not clothed with the solemnity of writing. And the case itself, with the opinion of the court upon the whole

case, seems to show, that the terms "a mere vote or other corporate act," were not intended to be restricted to mean, a vote or other act in writing. The contract which gave rise to the suit, was personal, under the hands and private seals of the agents of the corporation. But it appeared in evidence, that it was for the exclusive use and benefit of the corporation, and made by their agents for purposes authorised by the charter, and that the corporation had from time to time paid money on the faith of it to the plaintiff's intestate. And from that evidence, the court decided, that "the jury might legally infer, that the corporation had adopted the contract of the committee, and had voted to pay the whole sum, which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement," although there was no entry or memorandum in writing of the adoption of the contract by the corporation, nor of any vote for the payment of any part of the money. Here, then, was an unwritten act of a corporation, suffered to be inferred from other unwritten acts and circumstances. And no argument can fairly be drawn from the circumstance, that the corporation was defendant in that case; it was not put upon that ground by the court, or that the corporation might have kept any thing back, or that its recorded vote had been lost; but the decision went upon the broad principle, that a corporation might act without writing, and that its acts might be proved by circumstantial evidence; without adverting to any distinction between a corporation plaintiff and defendant. Nor could a corporation, because defendant, be presumed to do, what by its constitution it was incapable of doing. Besides, it will be remarked, that the jury were permitted to infer, from the facts and circumstances in the case, that the corporation had adopted the contracts, and voted to pay the money, not by a written act of adoption, or a written vote, but generally that it had adopted them, and voted to pay the money that should become due under them. And if an adoption in writing, or a written vote, had been intended, it would most probably have been so said; it is not so said, and there does not appear to be any thing in the whole case, from which it can be fairly implied. And in *The King vs The Inhabitants of Chipping Norton*, 5 *East*, 239, where the case states the agreement of the cor-

poration to have been a verbal one, which though not sufficient to pass the interest in the tolls, which from their nature could only be transferred by deed; yet it was held to be a ground for an application to a court of equity; which could not have been, if the agreement was void for want of being in writing. The case of *Fleckner vs The United States Bank*, does not sustain the position contended for. It is the case of *a written vote* of the board of directors; and the court, acting upon the facts of that case says, the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. It vindicates only, the binding effect of a written vote without seal, against the argument pressed at the trial, that a corporation could only act through the instrumentality of its common seal; but goes no farther, and does not touch the question, whether a corporation can act otherwise than by writing. It is admitted that in modern times corporations may act by writing without the common seal; but it is supposed, that the use of the seal grew out of the state of the times in which it originated, when seals were more common, and better known, than signatures, and the authentication of instruments by seals, was more certain, and attended with fewer difficulties and perplexities, than any other mode of authentication; and that the use of the seal is only dispensed with, because writing may *now* be proved with as much certainty as the common seal.

But that would seem to be a mistake, and that the greater facility and certainty, attending the authentication of an instrument by the use of the common seal, was not the reason why it was originally held, that corporations could act in no other way. It would have been a very good reason for preferring the use of the seal, to any other less certain mode of authentication, but not a sufficient reason for rejecting all other modes; nor does it any where appear, that the rule was originally introduced for that reason. *Blackstone*, in his commentaries, vol. 1, page 475, says, "a corporation being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore only acts and speaks by its common seal. For though the particular members may express their private

consents to any acts, by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." It was not, therefore, as a mere rule of evidence that the common seal was required, because more certain, and more susceptible of proof than writing, or any other mode of authentication; but because it was supposed, that a corporation being an invisible body, it was incapable of manifesting its intentions, by any personal act or oral discourse; and that having neither hand nor mouth, it could no more write than speak.

But as some mode of action was necessary to its operations, the common seal, which is incident to a corporation, was resorted to as an artificial representative; embodied in which shape, it could alone appear—the hand and mouth of the corporation, by which only it was permitted to act or speak. This technical nicety has however gradually given way to the public convenience, and the attenuated notion that the seal only was capable of uniting the several assents of the individuals composing the community, and making one joint assent of the whole, has yielded to the sober sense of mankind, which no longer delights in mere technicalities. Yet the character and constitution of corporations remaining the same, and the united assents of the individuals composing the community, being as necessary now as formerly, to constitute an act of a corporation, their assent must be proved in some way. But by what law, or on what principle, has writing been substituted for the common seal, and had imparted to it, the magical power which it did not formerly possess, of uniting the several assents of the different individuals who compose the community? Let it be borne in mind, that at the time when the seal was alone held to be capable of performing that office, writing was necessary to show to what it was the seal did unite the several assents of the individual corporators. But the writing alone was nothing, it had no agency in manifesting the assent of the corporation, it was the thing only assented to, and the seal it was, appended to it, that spoke the presence of the corporation, and manifested its assent. If there be any law substituting writing for the common seal, and declaring it to be the only means by which

the assent of a corporation can be manifested, it has not been produced, and we know of none such; or if there be any decisive authorities establishing that position, they have not been referred to. There are many authorities showing that corporations may act without seal, among which may here be again mentioned the cases before referred to, of *The King vs Bigg*, (in which the corporation was not a party,) where it was held, that the Bank of *England* might, without the common seal, entrust and employ a man to sign bank notes; the note (o) in 1 *Fonb.* 306, where it is said, "and the agreement of the major part of a corporation being entered in the corporation books, though not under the corporate seal, will be decreed in equity;" and *Fleckner vs The United States Bank*, in which, in speaking of a written vote of the board of directors of that bank, the court says—"the acts of such a body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal." But they go no farther. Seeing then, that the seal was originally required, not for the purpose merely of authenticating the writing to which it was appended, but for the technical purpose of uniting and expressing the joint assent of the corporation which could not be done by the particular members signing their names, and that writing was not competent to perform that office, and there being nothing peculiar to modern times imparting to it that quality, it cannot be required for that purpose; but if required at all, it can only be as evidence of the acts of a corporation, which, like the acts of natural persons, are subjects of proof. And the seal being no longer regarded as a necessary agent, to express the intention of a corporation, by uniting the several assents of the individual members, and making one joint assent of the whole, (which it is seen may now be otherwise manifested,) by what rule of evidence is it, that corporate acts are all required to be evidenced by writing, which of itself, when unaccompanied by a seal, is only parol evidence? We know of no such rule in practice; the general principles of evidence acknowledge none such, and when the acts creating corporations, do not direct it, we do not perceive why their acts must be established by positive record proof only; and why the corpo-

rate assent may not be inferred from facts and circumstances, which in regard to individuals, would be decisive in relation to transactions of a similar character. The question being, (now that the seal is dispensed with for that purpose,) not as to the mode of uniting the corporate assent, but as to the mode of proving the assent or act of a corporation. The proof by writing may be more eligible than facts and circumstances not reduced to writing, because more certain, and attended with less difficulty and perplexity; but it does not therefore follow, that it is the only mode of proof that can be admitted.

If that could be received as a sufficient reason for requiring written evidence of the acts of a corporation, it would apply with equal force to the transactions of natural persons, written evidence of which would, as well as in the case of a corporation, be attended with more certainty, and fewer difficulties, than circumstantial proof. But such a principle has never been admitted among the general rules of evidence, and the acts of individuals are continually established by presumptions arising from other facts and circumstances; and that not confined to the acts of a single individual, but extending equally to the joint transactions of several, though of the most solemn and important character. And it seems to us, that (the seal being dropt as necessary to unite the several assents of the individual members,) there is nothing to show, that writing is substituted in the place of the seal for that purpose, and that the same presumptions arise from the acts of corporations, as from the acts of individuals; consequently, that the corporate assent, and corporate acts, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence. In which we feel ourselves strengthened by authorities that will here be briefly adverted to.

In *The King vs Amory*, 1 *T. R.* 575, it is clear from the course of reasoning, both of the judges and the counsel concerned in the argument of the cause, that the acts of the corporate officers of an existing corporation, were considered as admissible evidence, from which the fact of the acceptance of a new charter might be inferred, and that it was not necessary to produce a written instrument, or recorded vote of acceptance. And if the acceptance of a new charter by an existing corpo-

ration, need not be in writing, but may be inferred from other facts and circumstances, it is difficult to imagine, why other acts of a corporation, or the acceptance of other instruments, may not be inferred in like manner. In *The King vs The Inhabitants of Chipping Norton*, we have seen, that the verbal agreement of a corporation was held to be a ground for an application to a court of equity. The agreement, therefore, was not considered void, for the want of being in writing. In *Wood vs Tate*, 5 *Bos. & Pull.* 246, which was an action of replevin, founded upon a distress for rent by the bailiff, of the bailiffs and burgesses of the borough of *Morpeth*, it was held by the court, that the payment of rent from time to time, by the plaintiff, to the officers of the corporation, was alone sufficient evidence of a tenancy from year to year under the corporation, to entitle the corporation to distrain for rent in arrear. In *Doe, on the demise of the Earl of Carlisle, vs Woodman and Forster*, 8 *East*, 228, it was held, that the payment of rent by the bailiffs of the borough of *Morpeth*, was evidence of a tenancy in the corporation. We have before seen, that in *The Bank of Columbia vs Patterson's Adm'rs.* where it appearing in evidence that the corporation had from time to time paid money on the personal contracts under their private seals of its committee, which were for the benefit of the corporation, it was held by the supreme court of the *United States*, that the jury might legally infer from that evidence that the corporation have adopted the contracts. In *The Proprietors of the Canal Bridge vs Gordon*, 1 *Pick. Rep.* 297, it was held, that corporations could be bound without a vote or deed by implications from corporate acts. Chief Justice *Parker*, in delivering the opinion of the court, said, "It is true that the acts, doings and declarations of individual members of the corporation, unsanctioned by the body, are not binding upon it; but it is equally true, that inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as in the case of an individual; and that a vote is not always necessary to establish such contract or promise." The question was, whether *The Proprietors of the Canal Bridge* had assented to a proposition by another corporation? And proceeding to comment upon the evidence, the judge said, "here was a direct and plain pro-

position, and if it had been met by as plain an acceptance by vote recorded, no one would imagine that any question could arise as to the effect." And he added, "the question is narrowed to this; have *The Proprietors of the Canal Bridge* assented to this proposition and acted under it? We find no vote to this effect; but we do find, that the cross bridge was suffered to unite with theirs pursuant to the proposition, and that for four years, all were suffered to pass without toll, who came from *Charlestown* to *Cambridge*, or *vice versa*. Now corporations can be bound by implications, as well as individuals, as has been before stated, and no acts could be stronger to show an assent to a proposition, an agreement or bargain, than those which have been mentioned." Here was no vote or written memorandum, nor any foundation for presuming a vote, or other written assent of the corporation. On the contrary, the court went expressly on the ground that there was no vote, but that the assent of the corporation might be inferred from other corporate acts. And in *Whittington vs The Farmers Bank of Somerset and Worcester*, before adverted to, it was decided, that it was not necessary an order of the president and directors should be in writing to give it validity, but that it might be proved, if not reduced to writing, by oral testimony. Other decisions in *Pennsylvania*, *New-York* and *Massachusetts*, might with effect be brought into this discussion, but it is thought to be unnecessary. In *Smith and others vs The Governor and Company of the Bank of Scotland*, in the House of Lords, 1 *Dow's Rep.* 272, the appellants were sureties in bond to the bank of *Scotland*, with *Patterson* the principal, who was an agent of the bank. The bond was at first sent to the bank, but returned to *Patterson* to get it properly executed, and was then sent back again to the bank; but while it was *in transitu*, and before it got back to the bank, or into the hands of its officers, *Patterson* was removed from his office. One of the questions raised in the House of Lords was, as to the due delivery of the bond. Lord *Eldon* said, "the court below had attended to the objection with respect to the delivery of the deed, they seemed to have considered it properly delivered, and he did not think, there was sufficient ground to quarrel with their decision on that head." Lord *Redesdale* said, "as *Patterson* seemed to

have acted as the agent of the bank in the transaction, delivery to him might be considered as delivery to the bank." And the House of Lords decided, "that if not impeachable on other grounds, it was to be considered as a delivered deed." The case was argued by Sir *Samuel Romilly* and Mr. *Brougham* for the sureties, and is a very strong case. The opinion of Chief Justice *Mashall*, in *The Bank of the United States vs Dandridge*, in the Circuit Court of *Virginia*, (which was exactly similar to this,) "that the bond was inoperative, unless the assent thereto of the directors, had been entered on the record of their proceedings," was pressed upon us in the argument. And if any thing could have caused me to doubt, it would have been the opinion of that distinguished judge; the decision however, of the circuit court, has we are informed been reversed in the Supreme Court of the *U. S.* by the unanimous opinion of all the other judges. It will be admitted, that a corporation may be bound by the acts of its duly authorised agent, although such acts are not reduced to writing. The charter of this bank requires, that the cashier shall give bond with two or more securities, "to the satisfaction of the president and directors." If there had been no such provision, and the corporation had appointed an agent, or board of agents, or a committee, for that purpose, could it have been successfully contended, that the acceptance of the bond by such agent or committee, or board of agents, must have been in writing? If not, what is there in this case, to distinguish it materially from that? Are not the directors constituted by the charter the duly authorised agents of the corporation?

By the *seventh section* of the charter, it is provided, that "the affairs of the said company shall be conducted by a president and sixteen directors, together with such other directors as the state shall appoint." By the *eighth section*, the directors are empowered to appoint a cashier and other officers for conducting the business of the corporation. By the *ninth section*, the president and directors are empowered to make by-laws, &c. for the government of the corporation, &c. By the 9th fundamental article of the constitution, the president and eight directors are constituted a board for the transaction of business; and by the 14th, the cashier is required to give bond

with two or more sureties, to the satisfaction of the president and directors.

The directors then are agents of the corporation appointed by the charter, and why should their acts, within the scope of their authority, be required to be in writing, more than the acts of agents appointed by the corporation itself? The acceptance of the cashier's bond, is within the scope of their authority, and the terms of the charter from which they derive that authority, do not require their acceptance, or their being satisfied with the sureties in the bond, to be in writing, nor do we perceive on what ground the affirmative of the proposition can at this day be maintained. But it is thought unnecessary farther to prosecute the examination of this branch of the case. The bond in question, which was not attested, having been found deposited among the archives and valuable original papers and documents of the bank, in an iron chest in the banking-house of the corporation, together with other papers, purporting to be the bonds of the tellers, book-keepers, and other inferior officers; and having been produced at the trial by the plaintiffs, and *Higginbothom*, whose original appointment as cashier, is recited in the bond, having been continued in the constant employment of the bank from that time until he was dismissed in 1819, without any reappointment, or on any other bond being given, we think the jury, in the absence of all other evidence respecting the execution of the bond, ought to have been permitted to infer, that it was duly executed and delivered by the defendant, and accepted by the plaintiffs; which acceptance necessarily included the approbation of the board, or their satisfaction with the sureties, and was not necessary to be in writing.

The question presented by the plaintiffs' *sixth* bill of exceptions, is upon the admissibility of the corporation books, on proof that they were kept by *Pierce L. Tanner* and *Jacob Hart*, as officers of the corporation; that the several entries contained in the books, were in the proper handwriting of *Tanner* and *Hart*; that they were kept under the superintendence and direction of *Higginbothom;* that *Hart* was dead, and that *Tanner* was residing out of the jurisdiction of the court in parts unknown; which were rejected by the court as inad-

missible. And perhaps it could not well have been otherwise, after the bond on which the suit was brought had been rejected.

It appears from the pleadings in the cause, which are very prolix and complicated, that the fact of there being in the books, false and deceptious entries, made by the clerks with the knowledge and connivance of *Higginbothom*, were distinctly put in issue on several of the breaches assigned in the replication. The books were not offered for the purpose of proving the truth of the facts which the entries professed to assert, as in the case of an offer to prove, by the entries in a book, the delivery of the articles charged. But to show as facts what entries were in the books, which could only be done by the production of the books themselves. For which purpose, under the pleadings in the cause, and being of opinion that the bond was improperly rejected, we think the books ought to have been received in evidence, on proof that they were kept by *Tanner* and *Hart* as officers of the bank, and that the entries were in their handwriting; which we think might well be done in such a case, in order to lay a foundation for letting in other testimony to show fraud, malconduct, neglect, or violation of duty on the part of *Higginbothom*, and of *Tanner*, in relation to the entries, and the manner of keeping the books. Moreover, it is stated in the exception, that the plaintiffs offered to prove that the books were kept under the superintendence and direction of *Higginbothom*; and if that were the fact, their admissibility was no more subject to objection, than if they had been kept by himself.

Upon the whole, then, we concur in opinion with the *Baltimore* county court on the plaintiffs' *first* bill of exceptions, and differ from that court upon all the other exceptions taken by the plaintiffs.

The questions raised on the demurrers by the defendant, in relation to the duration of the cashier's bond, present, we think, but little difficulty, and will be briefly disposed of. The original act of incorporation was limited in its duration to the expiration of the year 1815, and to the end of the next session of assembly thereafter, which was the 6th day of February 1817; and by the act of 1815, *ch.* 167, it was extended to the 1st of

January 1835, and to the end of the session of the general assembly next thereafter. By the charter the directors are to be chosen annually, and for that reason, connected with the *eighth* section authorising the directors for the time being to appoint a cashier and other officers, it has been contended *first*, that the appointment of cashier is an annual appointment, and that the obligation of the bond in question did not extend beyond the end of the year next ensuing the appointment of *Higginbothom* as cashier. If the premises were true, the conclusion would be unavoidable. But the premises, we think, are not true; and that the appointment of cashier is not an annual appointment, but limited only by the duration of the charter, subject to the removal of the incumbent by the directors, as occasion may require. If the cashier was a mere clerk or agent of the directors, who are themselves annually appointed, it might be otherwise; but he is not the mere servant or clerk of the directors who appoint him, but an officer of the corporation, appointed by its agents duly authorised for that purpose, whose limited term of service has no connexion with the duration of his appointment. The provision in the charter, "that the directors for the time being shall have power to appoint a cashier," does not mean that the office of cashier must annually become vacant, and that every new set of directors are to appoint a new cashier. The *eighth section* of the charter provides for the annual election of directors; and if it had been intended that a cashier should be also annually appointed, the reasonable presumption is, that it would have been so directed. And in the absence of any such provision, the words "the directors for the time being shall have power to appoint a cashier." &c. must be understood as meaning only, that whenever, for any reason, the appointment of a cashier should be necessary, the then board of directors should be authorised to make the appointment. In giving this construction to the *eighth section*, some aid is derived from the use of the same language in the *ninth section*, which provides "that the president and directors for the time being, may make all such rules, orders, by-laws and regulations, for the government of the corporation," &c. Now it cannot be intended that every new board shall make a new set of by-laws, &c. but only when by-laws, &c. are to be made,

to authorise the making them by the then board of president and directors.

But it is contended, *secondly*, that the bond in this case is only co-extensive with the limitation of the original act of incorporation; that is, that it does not reach beyond the expiration of the year 1815, and the end of the next session of assembly thereafter, which was the 6th of February 1817, and that the defendant is only responsible for violations by *Higginbothom* of the condition of the bond, between the date and the 6th of February 1817. In construing this bond, we must look to the intention of the parties at the time it was executed. It is a question of intention which, when ascertained, must govern the construction. When the bond was executed then the act of incorporation, under which it was given, was limited in its duration to the 6th of February 1817. The bond looked to the time for which *Higginbothom* was appointed, and that was restricted by the limitation of the charter as it then stood. What then was the intention of the parties? And where is that intention to be found? Where but in the original act of incorporation, under which the bond was executed? And looking to that act, it would seem to be very clear, that no responsibility was contemplated beyond the period of its duration—"there was no idea *then*, of carrying it any further." The parties knew the legal duration of the charter expressed upon the face of it; they contracted with a view to that duration, and the contract must be expounded as the law was when the contract was made. The president and directors, under the authority given them by the act of incorporation, to appoint officers of the corporation, could not appoint them for a term of service exceeding the legal existence of the corporation. With that corporation, limited in its duration to the 6th of February 1817, the defendant contracted for the fidelity of one of its officers while in its service, which service could not, as the law then was, point to a period beyond the existence of the corporation itself. It is true a power rested in the legislature to extend the duration of the charter, which has since been done. But it was not with the corporation in its enlarged shape, that the defendant contracted. And what the contract was, at the time it was entered into, so it remains; and the act of 1815,

extending the duration of the charter, could not enlarge the liability of the defendant without his consent. If he had been asked at the time of executing the bond, whether he would be willing to become a surety for *Higginbothom*, for any length of time to which the charter might be extended by the legislature, of which it was a creature, it may be, that he would have assented to it; but it is by no means evident that he would; and we are not to speculate on what he might have been willing to do. We can look only to what he did. The bond is general to *The President and Directors of the Union Bank of Maryland*, and recites, that they had employed *Higginbothom* in the capacity of the cashier, and such other business as they might think fit to employ him about; without a word in relation to any extension of the charter, or any services to be performed beyond the time to which the then charter was limited. We cannot then presume, that any extension of the charter was in the contemplation of the parties, but that the contract was made with a view to a law, which by its own limitation was to expire on the 6th of February 1817; and we must expound the contract, by the law as it then was, and not by the continuing act of 1815, which did not enter into the contract, and could not enlarge it. We think, therefore, that the defendant is not responsible on that bond or contract, for any thing done, or omitted to be done, by *Higginbothom*, after the 6th of February 1817, acting in the character of cashier; and that the several demurrers on the part of the defendant were properly sustained by the court below.

The authorities relied upon by the counsel for the plaintiffs to show, that the day laid is often immaterial, and that the demurrers could not be supported, whatever might be the legal duration of the bond, are not applicable to such a case as this. It is very certain, that the day laid is frequently not material; as in trespass, where the injury charged may be proved to have been committed on a day before or after the time stated in the declaration; provided it appears to have been before the action was brought, the substantial part of the issue being, whether the trespass was *committed*, and not *on what day* it was committed. And if in such a case, the day was material, as the ob-

jection would not appear upon the record, but depend upon the evidence, it could not be taken advantage of by demurrer.

But here, so far as the breaches demurred to allege matter as violations of the condition of the bond, after the sixth of February in the year 1817, the time laid is material; it is the very matter in controversy between the parties, depending upon the true construction of the contract, and raises the question of the legal responsibility of the defendant for any acts or omissions of *Higginbothom* as cashier, after the period of the original limitation of the charter, and the objection does not depend upon the evidence, but appears upon the record.

The objection is not to the form in which the breaches are assigned, nor to the introduction of merely immaterial matter, that might be treated as surplussage; but to the allegation of material matter beyond the responsibility of the defendant, on which he could not with safety have gone to issue.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

THOMAS's Lessee *vs* TURVEY.—June, 1827.

A sheriff's return to a *fieri facias*, which states a levy on "part of a tract of land called," &c. is void for uncertainty; cannot be set up by matter *de hors* the return, and a sale under it passes no title.

But a levy on "a tract of land called," &c. under a *fieri facias* against one who was seized of a part of such tract, and a sale under it, will pass his interest to the purchaser.

APPEAL from *Charles* County Court. Ejectment brought by the plaintiff below, (now appellant,) to recover "all that tract or parcel of plantable land called *Borough Hall*," containing 500 acres more or less. Defence was taken on warrant by the defendant, (the appellee,) under the plea of not guilty. Issue was joined and plots were returned.

At the trial the plaintiff read in evidence a certificate of survey of *Borough Hall*, made on the 4th of February 1666, for and in the name of *Robert Henley*, containing 500 acres. Also the following entry taken from the Rent Rolls, viz. "500 acres. 10, Rent. *Borough Hall*, surveyed 5th February 1666, for *Robert Henley*, in the woods near the land formerly laid out for *Thomas Harris*. Poss'ors. 350, *William Courts*. 150, *Samuel Clagett*." He further proved, that *William Courts*,

deceased, was seized of a part of the said tract of land in his demesne as of fee. That certain writs of *fieri facias* issued from *Charles* county court against the said *Courts*—One dated the 10th of May 1819, on a judgment rendered in that court at the suit of *Alexander Greer*. Another dated the 2d of June 1819, on a judgment, &c. at the suit of *Horatio Clagett*. Another dated the 15th of July 1819, on a judgment, &c. at the suit of *Rice* and *Newton*. Another dated the 4th of October 1819, on a judgment, &c. at the suit of *Elizabeth B. Laidler*. Another dated the 4th of October 1819, on a judgment, &c. at the suit of the same. The plaintiff then gave in evidence the schedule of appraisements and returns of the sheriff, made upon the said writs of *fieri facias*. The schedule to the *first*, *second*, *fourth* and *fifth*, above mentioned writs of *fieri facias*, described the land as seized and taken under those writs by the sheriff, and appraised, &c. to be "part of a tract of land called *Borough Hall*, containing the supposed quantity of 130 acres of land more or less." The schedule to the *third* above mentioned writ described the land as seized, &c. to be "a tract of land called *Burrow Hall*, containing 130 acres more or less." The sheriff's returns to each of the said writs were—"Laid p. schedule, and the lands and tenements sold to *Zachariah Thomas* for $800," &c. The plaintiff then gave in evidence a deed from the said sheriff, (*George H. Spalding*,) to *Zachariah Thomas*, the lessor of the plaintiff, dated the 9th of November 1819, reciting the several writs of *fieri facias* herein before mentioned; and that in pursuance of the commands therein contained the said sheriff laid the same upon "part of a tract of land called *Borough Hall*, being of the lands and tenements of the said *William Courts*, containing one hundred and thirty acres more or less." That after due notice being given, &c. the said sheriff did, on the 30th of October 1819, sell the same to the said *Thomas* for the sum of $800, &c. The plaintiff then proved all his locations made by him on the plots returned in the cause. The defendant then prayed the court, and their instruction to the jury, that the said schedules and returns were not sufficiently certain to enable the plaintiff to recover. Which opinion the Court, [*Stephen*, Ch. J. and *Key*, and *Plater*, A. J.] gave to the jury. The plaintiff ex-

cepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, ARCHER, and DORSEY, J.

*Stonestreet*, for the Appellant. 1. The plaintiff below, located on the plots in the cause the tract of land called *Borough Hall*; and he also located every part thereof which had been sold out, and was not in the possession of *Courts* at the time the writs of *fieri facias* were laid, leaving *Courts's* part of that tract marked by metes and bounds; and which is the part taken under the writs of *fieri facias*. Of this part *Turvey*, the defendant, was tenant to *Courts*. These locations the plaintiff proved—they were not counterlocated.

2. In one of the schedules to the writs of *fieri facias* offered in evidence, the land is described—"a tract of land called *Borough Hall.*" This, it is contended, is sufficiently certain to enable the plaintiff to recover.

3. The prayer to the court below, as stated in the bill of exceptions, was that the schedules and returns were not sufficiently certain to enable the plaintiff to recover. This confines the inquiry of this court to that single question. And as it is manifest that one of the schedules describes the land with sufficient certainty, the judgment of the court below must be reversed.

4. All the other schedules, and each of them, give a sufficient description of the land seized. The reason why it has been objected that "part of a tract of land" is too uncertain is, that the sheriff would not know where, or on what land to execute a writ of possession. In this case no such difficulty would occur, as the particular part sold as *William Courts's* has been laid down on the plots by metes and bounds, and is admitted to be correctly located; which survey was made at the instance of the defendant, he having taken his defence on plots. And as the part of the tract seized under the writs of *fieri facias*, is distinctly marked out on the plots, a writ of possession can be executed without any difficulty.

For the principles contended for, he referred to *Barney vs Patterson's, Lessee*, 6 *Harr. & Johns.* 204, 205. *Shep. Touch.* 249; and 1 *Phill. Evid.* 203.

*Taney*, *Magruder*, and *C. Dorsey*, for the Appellee, submitted the case to the court without argument.

ARCHER, J. delivered the opinion of the Court. The plaintiff, to show title in himself in the tract of land called *Borough Hall*, for which the suit was instituted; and for the purpose of showing that the title of *William Courts*, under whom the defendant claimed, and in whom a seizin in fee had been shown in the tract of land for which the suit had been brought, had been divested by a judicial sale, produced in evidence, as one of the links in the chain of his title, five several writs of *fieri facias*, with the schedules of appraisement and returns of the sheriff, issued on judgments obtained against *William Courts*. The defendant prayed the court to direct the jury, that the schedules and returns were not sufficiently certain to enable the plaintiff to recover; which direction the court gave. From this direction this appeal has been taken; and our inquiry is solely confined to the sufficiency of these schedules and returns.

Every schedule, except upon the third *fieri facias*, states a levy on part of a tract of land called *Borough Hall*. At this day it would seem to be unnecessary to express an opinion on the insufficiency of such a levy and sale to pass title, when the doctrine every where throughout the state, has for a long period of years corresponded with the decision of the court below. But it is contended that there exists in this case, that which differs it from ordinary cases, and will exempt it from the operation of the general rule. It is conceived, that because the plots identify the land levied upon and sold, and are uncontradicted by locations, that this circumstance cures the insufficiency of such a levy and sale; and if the only reason for such an insufficiency was that which has been stated by the appellant's counsel, to wit, that if a recovery was had the sheriff would not know upon what land to execute the writ of possession, it might perhaps be deemed sufficient, inasmuch as certainty is by the admission of the parties in their locations, given to the place sold. But that is not the true reason. A deed for part of a tract of land, designating the quantity, but without any description of the part sold, when unsupported by the principle of election, would be void. The ambiguity on the face

of the conveyance could not be explained by extrinsic circumstances. So in this case no title could pass to a purchaser at such sale; for the sheriff's levy and return would be void for uncertainty, and could not, by any possibility, be set up by matter *de hors* the return. The objection, therefore, is that no title passes by it, and the plots in the cause, which admits its location, cannot aid or set up what was radically void and defective *ab initio*.

But the third schedule and return is in the usual form, and was upon the whole tract called *Borough Hall*, for which the suit was brought, and was certain and sufficient. The court below, therefore, erred in declaring that all the schedules and returns were insufficient—this one being good and available.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## DARNALL'S EX'RS. *vs.* MAGRUDER.—June, 1827.

A receipt for a sum of money by which the person receiving it undertook to return the sum borrowed, "when called on to do so," creates a cause of action from its date, bearing interest, and against which the act of limitations begins to run, from that time.

APPEAL from *Prince-George's* County Court. Action of *assumpsit* brought on the 6th of April 1822, for money lent and advanced—money had and received—money laid out, expended and paid, and on *an insimul computassent*. The defendant, (the appellee,) pleaded *non assumpsit*, *non assumpsit infra tres annos;* and *actio non accrevit infra tres annos*. Issues joined on the general replications.

At the trial the plaintiffs gave in evidence the following receipt signed by the defendant: "Received, June 3d, 1807, of Mr. *John Darnall*, the sum of two hundred and eleven dollars, which I hereby engage to return to him when called on to do so. *D. Magruder.*"

Whereupon the defendant prayed the court to instruct the jury, that if they should be of opinion from the evidence in the cause, that three years had elapsed from the date of said paper before the impetration of the original writ in this cause, that

then they must find a verdict for the defendant. Which opinion and instruction, the Court, [*Stephen*, Ch. J. and *Key*, A. J.] gave to the jury. The plaintiffs excepted; and the verdict and judgment being for the defendant, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, and MARTIN, J.

*Magruder*, for the Appellants, contended. that the act of limitations did not begin to run from the date of the instrument of writing, nor until demand of payment. He referred to 2 *Stark. Evid.* 891. *Collins vs Benning*, 12 *Mod.* 444. He insisted that interest could be claimed only from the time demand was made of the money due.

*C. Dorsey*, for the Appellee. The action is not on the instrument of writing; but is an action of general *indebitatus assumpsit*, which admits that the money was due at the time the promise was made. He cited *Bull. N. P.* 181. *Walmsley vs Child*, 1 *Ves.* 344. 15 *Vin. Ab.* tit. *Limitation*, 103, pl. 14. *Wallis vs Scott*, 1 *Stra* 88.

THE COURT. No doubt interest might be demanded from the date of the instrument of writing; and of course it became due and payable on the day of its date.

JUDGMENT AFFIRMED.

BERRY *vs.* GRIFFITH.—June, 1827.

The Court of Appeals will not grant a rule on an appellant who has removed out of the state since the appeal, to give security for the costs of suit.

APPEAL from *Montgomery* County Court.

*F. S. Key*, for the Appellee, moved the court for a rule on the appellant to give security for the costs—The appellant having, since the appeal in this case, removed out of the state, into the District of *Columbia*. He filed an affidavit, proving the fact of such removal.

RULE REFUSED.

## WALL *vs.* FORBES.—June, 1827.

A tract of land may acquire, by reputation, a name different from that which it bears in the patent, and may pass by such acquired name.

In an action of covenant, where the plaintiff sued out a warrant of resurvey, and plots were returned, to establish his claim he cannot examine a witness as to the location on such plots, who was neither examined upon nor attended the survey.

APPEAL from *Prince-George's* County Court. This was originally an action of *debt*, but was afterwards amended to *covenant*. It was brought by the appellee, as the survivor of *M'Elderry*, on the following instrument of writing: "On or before the twentieth day of May eighteen hundred and eighteen, we, or either of us, promise and oblige ourselves, our heirs, executors and administrators, to pay, or cause to be paid, to *Geo. Forbes* and *Horo. C. M'Elderry*, agents for the trustees of *Eliz. Bond*, their certain attorney, heirs, executors, administrators or assigns, the full and just sum of ten dollars per acre for one half of a tract of land known by the name of *Timber Neck*, and supposed to contain in the whole three hundred acres, with legal interest thereon from the 20th of November 1817, it being for value received. As witness our hands and seals this 1st of December 1817.

*Jno. B. Thomas*, (Seal.)
*John T. Wall*, (Seal.)

Witness,—*Charles S. Weems.*"

The declaration averred that the said tract of land contained in the whole 300 acres, and that the one half contained 150 acres. That the amount due from the defendant to the plaintiff for the one half, &c. amounted in the aggregate to $1500, with interest, &c. which the defendant had not paid, &c. The defendant pleaded, 1. That the plaintiff at the time, &c. had nothing in the land, whereof he could make sale, &c. 2. That the tract contained three acres and no more; without that, that the same contained 300 acres, &c. 3. Payment of the money he was bound to pay. Replications. To the *first* plea, demurrer, and joinder. To the *second*, that the tract contained 300 acres, and not three acres, &c. Issue joined. To the *third* plea, nonpayment, &c. Issue joined. A warrant of resurvey issued, and plots were made. Verdict for the plaintiff on the issues in fact. Demurrer overruled on the issue in law.

At the trial the plaintiff read in evidence the covenant upon which this suit was brought as herein before mentioned. He also read in evidence the plots and explanations in this cause. The plaintiff then claimed to be paid $10, per acre, for all the land which upon the plots filed is comprehended within the following lines: Beginning at black *D*, and running thence the lines shaded blue 1, 2, 3, &c. and which is described in the explanations as the land for which the trustees of *Elizabeth Bond* bring suit against *John T. Wall*, &c. And for the purpose of showing that under the issues in this cause, and upon the plots filed in it, they are entitled to recover at the rate of $10, per acre, for all the land described and located as aforesaid, beginning at black *D*, and running the blue shaded lines, and which is alleged in the explanations to contain 272 acres, offered to prove by witnesses sworn in the cause, that the land included within the said lines as aforesaid had long been known by the name of *Timber Neck*, and that the covenant aforesaid related to said land comprehended within the lines aforesaid, and not to the tract of land located by him on the plots by the name of *Timber Neck*. And offered to give in evidence that the land embraced within the lines aforesaid had been known, long prior to the date of the said covenant, as *Timber Neck*, and that by virtue and under the said contract the defendant entered on the lands embraced within the said lines, and occupied it as *Timber Neck*. To the admission of any such parol testimony for such purposes, the defendant objected, and contended that upon the issues, plots and explanations, in this cause, such testimony could not be admitted to prove that the contract related to any land not located on the plots by the name of *Timber Neck*. But the Court, [*Key*, A J.] overruled the said objection, and was of opinion that the whole of said testimony offered by the plaintiff was admissible, and permitted every part of it to be given in evidence to the jury; and accordingly the same was given to the jury. The defendant excepted. Judgment on the verdict for the plaintiff, and the defendant appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, and MARTIN, J.

*Magruder* and *Stonestreet*, for the Appellant. 1. If such parol proof could have been admitted at all, yet the plaintiff below, in order to offer such proof, ought to have located the land as the tract of land called or known by the name of *Timber Neck*, and not having done this, could not offer proof that it was, what he attempted to prove it to be, *Timber Neck*. 2. No such parol proof was admissible to explain or add to the written contract. 3. Parol proof that the covenant related to the said land, and not to the tract called *Timber Neck*, is utterly inadmissible. 4. The action could not be amended from *debt* to covenant.

To show that parol evidence was not admissible, they cited *Batturs vs Sellers & Patterson*, 6 *Harr. & Johns.* 249. 1 *Phill. Evid.* 412, 414. That the writ could not be amended they referred to the act of 1809, *ch.* 153; and *Stoddert vs Newman*, 7 *Harr. & Johns.* 251.

*C. Dorsey*, for the Appellee. Certainty in pleading is necessary. 1 *Chitty's Plead.* 235. The plots in the cause are a part of the pleadings, and this case must be assimilated to an action of ejectment. A tract of land may acquire a name by reputation. *Rench vs Beltzhoover*, 3 *Harr. & Johns.* 469. The contract was for the sale of *Timber Neck*, and it appears that certain tracts of land had acquired that name by reputation; and parol evidence is admissible to prove that fact. It is a latent ambiguity.

The defendant below waived his right to take advantage of the writ and declaration being amended from *debt* to *covenant*, by pleading to the amended declaration. *Boats vs Edwards*, *Doug.* 227.

BUCHANAN, Ch. J. delivered the opinion of the Court. There is no doubt that a tract of land may acquire, by reputation, a name different from that which it bears in the patent, and may pass by such acquired name. But that does not appear to be a point before us.

The contract, on which the suit was brought, relates to a tract of land called *Timber Neck*. A tract of that name is located on the plots returned in the cause, with three others, *Wood's Joy*, *Ludford's Hope*, and *Anderson's Chance*; then there is

a location carved out of those four tracts, which is described on the plots, as being "*Part of Timber Neck, Part of Wood's Joy, Part of Ludford's Hope*, and *Anderson's Chance*;" and to prove that they together, as so located, had long been known by the name of *Timber Neck*, and constituted the subject of the contract, and not the land located on the plots by the name of *Timber Neck*, witnesses were offered and admitted by the court below, who do not appear from the statement in the bill of exceptions, to have been on the survey. And the question presented is, whether under such circumstances such testimony ought to have been received? And we think it should not. As a general rule, a person who has neither been examined upon, nor attended a survey, is not a competent witness to give evidence at the trial of a cause in relation to the locations made upon the plots; and we can perceive nothing set out in the bill of exceptions, to take this case out of the rule. Nor do we mean to be understood as deciding the question, whether to render a witness competent at the trial, he must have been sworn on the survey; which is not necessary to be decided in this case.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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## WILLIAMSON *vs.* DILLON.—June, 1827.

On the 25th of January 1817, D agreed with W, under seal, to deliver to him or order at Z, 250 barrels of flour, not less than 1-3d of which to pass as fine quality, the remaining 2-3ds of superfine, to be at said place by the 1st of March then next, to be lined and in good shipping order; and to deliver on the 15th of the same month 250 barrels of flour of same quality as the first mentioned quality, and in like order, to W, or order, at the above named place; for which flour, on its delivery as above, W bound himself to pay, &c. In an action of covenant on this contract the breach assigned being that the flour when delivered was sour, common, inferior, and of bad quality, and not in good shipping order, and would not and did not pass inspection as fine or superfine.——*Held*, that the inspection was no part of the contract, as it related to the time and place of delivery, but only the evidence or test by which it was agreed the quality of the flour should be ascertained; that the moment the stipulated time for the delivery of the flour had passed, the contract was either performed or broken, and it was only necessary to carry it to a place for inspection, to furnish evidence of its quality; and that the difference of price at Z, at the time stipulated for its delivery, between the

flour delivered and that contracted for, was the true measure of the plaintiff's damages in this case.

In an action on an agreement to deliver a specific article, at a particular time and place, to be paid for at the time of the delivery, the measure of damages is the same, whether brought for a nondelivery, or a delivery of a different quality from that contracted for. The value of such article at the time and place of delivery, is the true measure; unless where the contract showed it was for a particular purpose, and special damages were laid in the declaration.

In proving the relative prices of different qualities of flour at Z, in 1817, other testimony is admissible than direct positive proof from a witness who knew the value at that place; in the absence of such positive proof the jury may infer such value, from proof of the price of each kind of flour in 1817, at other places in the neighbourhood of Z, and at N O, a port to which flour was commonly sent from Z, for inspection and sale; and this latter species of evidence, which is admissible for the above purpose, is not secondary, though of a less conclusive character than direct proof.

Where it was doubtful, from the want of care in drawing a bill of exceptions, whether the whole testimony of a witness was hearsay, part of it being unquestionably so, the appellate court made a comparison of the several parts of the testimony, and determined the whole to be hearsay, and therefore incompetent.

Information received by one partner, the witness, from his copartner, of the price of merchandize purchased by him at Z, for which the witness knew that his house at B, where he resided, paid at the price mentioned, is but hearsay evidence of the price of such merchandize at Z.

Where a witness in his answer taken under a commission declared, "that he was called on in the spring of the year 1817, to state the difference usually allowed on the sale of flour between superfine, fine, &c. that he then stated the difference was as follows," &c —*Held*, that this might be true, and yet the witness have no knowledge of the facts; his declaration being, that he made the statement, and not that it was true. Such testimony is not admissible in evidence.

APPEAL from *Baltimore* County Court. Action of covenant, brought by the appellant, (the plaintiff below,) who declared against the appellee, (the defendant,) for a breach of the covenant hereinafter mentioned. The breach assigned was, that the defendant did not deliver 500 barrels of flour to pass 1-3d as fine quality, and the remaining 2-3ds as superfine, lined and in good shipping order; but that on the contrary thereof the said flour when delivered was sour, common, inferior, and of bad quality, and not in good shipping order, and would not and did not, nor did any part thereof pass inspection, as fine or superfine, according to the said covenant; and so, &c. The defendant pleaded *performance*, on which plea, issue was joined,

1. At the trial the plaintiff offered in evidence the contract executed between the plaintiff and defendant, bearing date on the 5th of January 1817, which here follows: "*Zanesville, Ohio.* Memorandum of an agreement made and entered into this twenty-fifth day of January 1817, between *Moses Dillon*, of *Zanesville*, state of *Ohio*, and *David Williamson* of *Baltimore*, state of *Maryland*, whereby the said *Moses Dillon* obligates and binds himself to deliver to the said *Williamson*, or order, at *Zanesville*, two hundred and fifty barrels of flour, not less than one third of same flour to pass as fine quality, the remaining two-thirds of superfine, to be at said place by the first day of March next, to be lined and in good shipping order; and to deliver, on the 15th of same month, two hundred and fifty barrels of flour of same quality as the first mentioned quality, and in like order, to the said *Williamson*, or order, at the above named place, for which flour, on its delivery as above, the said *David Williamson*, Jr. binds and obligates himself to pay to the said *Moses Dillon*, or order, the sum of seven dollars per barrel, for which flour payment will be made to the said *Dillon* with his bonds passed to *Luke Tiernan* and *Kennedy Owen*, of *Baltimore*, interest being added in said bond to the day of the delivery of said flour at the par of exchange. In testimony whereof we have hereunto set our hands and seals this day and year above written.

*Moses Dillon*, (Seal.)
*D. Williamson*, Jr. (Seal.)

Signed, sealed and delivered, in the presence of *Isaac Dillon.*"

And also gave in evidence, that the plaintiff was at the time of the making and executing of the said contract, a merchant residing in the city of *Baltimore*, and the defendant was the owner of a mill near *Zanesville*, in the state of *Ohio*, and that *New-Orleans* was the great mart for the flour on the *Mississippi*, and its tributary waters. And the plaintiff further offered in evidence, that the trade in flour in the neighbourhood of *Zanesville* was then in its infancy, and that when flour was intended for *New-Orleans*, it was, according to the course of the flour trade in the *Mississippi*, and its tributary waters, to inspect flour at *New-Orleans*, when there was no public inspec-

tion of flour at the place where it was loaded in the boats intended to convey it down the river, and that on its passage down the river flour is never taken out of the boat to be inspected before it arrives at *New-Orleans*, when destined for *New-Orleans*. And also offered in evidence the depositions of sundry witnesses, and other proceedings taken and had under commissions for that purpose issued out of the said court to certain commissioners of *Zanesville*, in *Muskingum* county, in the state of *Ohio*, and of the city of *New-Orleans*, in the state of *Louisiana*. That part of the testimony which seems necessary to be stated, (it being admitted by the parties that the said commissions had been regularly executed,) is that of *Isaac Dillon*, the subscribing witness to the contract, who proved its execution. Also that of *Maunsel White*, of the city of *New-Orleans*, in answer to the *third* interrogatory propounded to him by the plaintiff, who proved "that he was called upon in the spring of the year 1817 by *Richard Relf*, to state the difference usually allowed on the sale of flour, between superfine, fine, common and middling: that he then stated that the difference was as follows: that two-thirds superfine and one-third fine, was the proportion established as merchantable; that when merchantable flour is worth twelve dollars a barrel, fine is only worth eleven, and middling and common worth eight. That when merchantable flour is worth eight dollars a barrel, fine is only worth seven, and middling and common six, and so in proportion." Also that of "*William Ross*, of the city of *New-Orleans*, of full age, being produced, sworn and examined, on the part of the plaintiff in this cause, deposeth as follows: 1. To the first interrogatory on the part of the plaintiff he answers, that he knows neither of the parties. 2. To the second interrogatory on the part of the plaintiff he answers, that in May 1817 he inspected a boat load of flour, amounting to four hundred and ninety-nine barrels, said to be from *Putnam*, in the state of *Ohio*, brought to the city by captain *Tarrier*, and consigned to *John C. Wederstrandt*, Esq. who being absent, the flour was delivered to *Richard Relf*, Esq. by whom this deponent was called to inspect it. 3. To the third interrogatory on the part of the plaintiff he answers, that the report of the inspection was as follows: Eighty-three barrels fine, three

hundred and ninety-nine common, sixteen middling, and one condemned. 4. To the fourth interrogatory on the part of the plaintiff he answers, that the flour, except the condemned barrel, did not appear to have been at all injured in its passage down the river, but its bad quality was owing to its having been badly manufactured. 5. To the fifth interrogatory on the part of the plaintiff he answers, that he was commissioned by *James Villere*, governor of the state of *Louisiana*, on the 1st day of January 1816." The defendant then offered in evidence the depositions taken under one of the said commissions at *Zanesville;* and he also offered in evidence, that in the year 1817 *New-Orleans* was the principal port to which flour, that passed the falls of the *Ohio*, was carried, but that it was sometimes sold at other places, when it was discovered that the *New-Orleans* market was not a favourable one; and that boats employed in the transportation of flour, ultimately destined for *New-Orleans*, were in the habit of calling at various places on the *Ohio* and *Mississippi*, such as *Cincinnati*, *Louisville* and *Natches*, when the owner or agent was on board, for the purpose of trying the market at these several places, and were governed on the further prosecution of their voyage to *New-Orleans* by the state of the market at the said places. And thereupon the court, upon the prayer of the plaintiff, gave the following instructions and directions to the jury: If the jury believe from the evidence that there was no public inspection of flour at *Zanesville*, then the plaintiff had a right to take the flour to any port or place on the *Ohio* or *Mississippi* rivers, where there was a public inspection of that article, provided in so doing he did not take it to an unusual port or place for the inspection of flour, descending from *Zanesville;* and if they believe the flour was inspected at *New-Orleans*, that *New-Orleans* was the great mart for the flour of the country on the *Muskingum*, and that flour, sold at any port or place on the *Muskingum* where there was no public inspection, was not usually inspected at any intermediate port between such place and *New-Orleans*, and that this was generally known to the dealers in flour on said river at the time the contract in this cause was executed, that then the jury might infer that *New-Orleans* was not an unusual place for the inspection of flour descending from *Zanes-*

*ville.* And furthermore, if the jury believe that the flour was not taken to an unusual place for inspection, that the defendant in that event took the risk of inspection; and if it does not at such place pass in quality such as the contract has stipulated, then the plaintiff is entitled to a fair indemnity for the difference in value of the flour as delivered and inspected, and the flour contracted to be delivered. The plaintiff then prayed the opinion and instruction of the court to the jury, that if the jury find from the evidence that *New-Orleans* was a usual and proper place for the inspection of flour delivered at *Zanesville*, at the time of the delivery of the flour in question; and if they also find that the flour, when inspected at *New-Orleans*, was of inferior quality, and of less value, as is stated in the deposition of *William Ross*, the flour inspector at *New-Orleans*, in one of the commissions herein before mentioned, than the flour contracted to be delivered, that then the measure of damages is the difference in value at *New-Orleans*, at the time of the inspection, between the flour contracted to be delivered, and the flour in question as passed by the inspector. Which opinion and instruction the Court, [*Archer*, Ch. J. and *Hanson*, and *Ward*, A. J.] refused to give; but instructed the jury, that according to the fair construction of this contract, the proper measure of damages is the difference in value at *Zanesville* between the flour stipulated to be delivered, and that which was delivered at the time the flour was by the contract to be delivered. The plaintiff excepted.

2. The plaintiff then offered to prove by a competent witness, that at the time of the contract in question, and of the delivery of the flour, and of the inspection at *New-Orleans*, the market price at *New-Orleans* regulated the price of superfine, fine, and common flour, on the *Mississippi* and the *Ohio*, at all the places with which he was acquainted, and also the relative value of such flour; and also that the witness was, at the times above mentioned, well acquainted with the flour trade on the *Mississippi* and the *Ohio*, but had not at those times any acquaintance at *Zanesville*, or with the flour trade on the *Muskingum* above *Marietta;* that the witness has no knowledge of the prices or relative value of flour at *Zanesville* itself, but that

at the times above mentioned he was acquainted with the flour trade at *Marietta*, and up the *Ohio* to *Pittsburg*, and there was not the difference throughout that course of more than six cents or 12½ cents per barrel for flour at any of the above places, if it were of the same quality; that at the times above mentioned, flour at *Marietta*, which would not pass inspection as fine, was of no value for exportation, and was not saleable for that purpose; that *Marietta* and *Zanesville* are both situated on the *Muskingum* river, *Marietta* at its mouth, and *Zanesville* about sixty miles higher up; that the price of merchantable flour, at the times above mentioned, at *Marietta*, was at least six dollars or upwards; and by merchantable flour, the witness means flour two-thirds superfine and one-third fine. The plaintiff offered in evidence, by another competent witness, that in 1817 he resided in the *western country* at *Steubenville*, and was acquainted with the prices of flour from *Louisville* to *Pittsburg*, and with the relative prices which it bore at different places on the *Ohio*, but not off the *Ohio*, and not at *Zanesville*; but at this time cannot state the prices at any of those places; that the buyers made their purchases, and were regulated in their prices by the prospects at *New-Orleans;* and that it was the usage in the places above mentioned to settle any damages for deficiency in quality, when the flour was to be inspected in *Orleans*, by the *Orleans* prices; that whenever there was no inspection at the place where the flour was put on board the boats, it was usual for the flour to be inspected at *Orleans*. To the admissibility of which evidence the defendant objected. And the court were of opinion that the same was not admissible to prove the relative value of superfine, fine, and common flour at *Zanesville*, and was not evidence which the jury were entitled to consider in ascertaining the damages which the plaintiff had sustained by the breach of the contract in this case; but that in order to furnish a standard of damages in this case, the plaintiff is bound to prove the value at *Zanesville* of the flour which the defendant contracted to deliver, and the relative value of that which was delivered at that place at that time; and thereupon refused to suffer the said evidence, or any part thereof, to be given to the jury for the purpose aforesaid. The plaintiff excepted.

3. The plaintiff then prayed the opinion of the court, that in the absence of all proof as to the relative prices of superfine flour, fine flour, and common flour, at *Zanesville*, or at any other place on the *Muskingum* river, except *Marietta*, the jury may, in estimating the damages of the plaintiff in this cause, take into consideration the relative value of the above mentioned qualities of flour at *Marietta*, it being the nearest point to *Zanesville* mentioned in the testimony. Which opinion the court refused to give. The plaintiff excepted.

4. Upon the above evidence given as stated in the first bill of exceptions, the plaintiff prayed the opinion of the court, that in the absence of all proof as to the relative value of superfine flour, fine flour, and common flour, at *Zanesville*, or at any other place on the *Muskingum* river, except *Marietta*, the jury may, in estimating the damages of the plaintiff in this cause, take into consideration the relative value of the above mentioned qualities of flour at *New-Orleans*, with a proper allowance for the expenses and risk of transportation to *New-Orleans* Which opinion the court refused to give. The plaintiff excepted.

5. The plaintiff further offered in evidence by a witness, that he purchased flour at *Zanesville* in the spring of 1817, and paid for it from six to eight dollars per barrel; and that the witness, at the time above mentioned, was engaged in shipping flour from the waters of the *Mississippi* and *Ohio*, and is acquainted with the flour trade in those waters; and that in the opinion of the witness, no merchant acquainted with the said trade would purchase for exportation at *Zanesville*, flour that would not pass inspection as merchantable flour, provided he knew it would not pass. That the witness paid for the freight of flour from *Zanesville* to *New-Orleans* two dollars per barrel; that the witness was not in the *Western Country* in the spring of the year 1817, and did not make the purchases he has mentioned, in person, but that some of the said purchases were made by the partner of the witness, and that some of them were made by his brother, as agent for the mercantile house of which the witness then was a partner, and that all the information of the witness of the facts of the purchases which he has mention-

ed is derived from his said partner and brother, who are both living; but that the witness knows that his house paid for the flour above mentioned, and for other flour purchased at other places on the *Western* waters, at the prices above mentioned, and which prices were stated to him by his said partner and brother as being the prices which they had contracted to give for the said flour. The defendant objected to the admissibility of the said evidence. And the court were of opinion, that the said evidence was not admissible to prove the relative value at *Zanesville* of superfine, fine, and common flour, and was not evidence which the jury were entitled to consider in ascertaining the damages which the plaintiff had sustained by the breach of the contract in this case; but that in order to furnish a standard of damages in this case, the plaintiff is bound to prove the value at *Zanesville* of the flour which the defendant contracted to deliver, and the relative value of that which was delivered at that place at that time; and thereupon refused to suffer the said evidence, or any part thereof, to be given to the jury for the purpose aforesaid. The plaintiff excepted.

6. The plaintiff then offered to read in evidence that part of the deposition of *Maunsel White*, which is contained in his answer to the third interrogatory. To the admissibility of which evidence the defendant objected. And the court were of opinion that the said statement contained in the said answer was inadmissible evidence, and refused to let the same go to the jury. The plaintiff excepted.

7. The plaintiff then, in addition to the evidence above stated, offered to prove by a competent witness, that the witness purchased flour on the *Mississippi* in the spring of 1817; that the said flour was sold in *New-Orleans* in the spring of that year; that part of the said flour was part superfine, and part common; that the difference in price between superfine and fine was one dollar per barrel, and the difference between superfine and common was four dollars per barrel; that witness was not in *New-Orleans* himself at the time when the sales were made; he knows that his house received payment for flour sold in *New-Orleans*, at the relative prices above mentioned,

at the time above stated; that the said sales were made by the partner of the witness, and the accounts were rendered of the sales in the manner and at the prices above stated; that the witness had no personal agency in making either the said sales or purchases, or any of them, having himself been residing all along in *Baltimore*, and that the above statement is made entirely on the information of his partner, and the agents of the house who resided in *New-Orleans*, and transacted the business, his said partner being still living. The said sales were made by agents of the house under the immediate direction of the partner of the witness, as he was informed by his said partner, and the accounts of which witness speaks, were rendered by such agents, and received by the witness from his said partner. To the admissibility of which testimony the defendant objected. And the court were of opinion, that the said testimony was inadmissible, and refused to suffer the same, or any part thereof, to go to the jury. The plaintiff excepted.

8. The plaintiff further offered to prove by a competent witness, that the witness was in *New-Orleans* in May 1817, and had orders to purchase flour; that the price of superfine flour at that time was $13; that he does not know the comparative value of fine and superfine flour. In the market of *Baltimore* the difference between fine and superfine is half a dollar. That fine and common flour is inferior in value generally to superfine, but that the witness made no inquiries at *Orleans* in relation to fine or common, and cannot therefore speak of the relative value of those qualities of flour at *New-Orleans*. The plaintiff further offered to prove by another competent witness, that he resided in *New-Orleans*, and did business there as a commission merchant from 1806 to 1811; that he was, during that time, in the practice of selling a good deal of flour, and was well acquainted with the *New-Orleans* market for flour, and the usage of that market at that time, and with the course of trade. That the flour, of which he speaks, was the flour which came down the *Mississippi;* that during the time above mentioned the difference in value between superfine flour and common flour was as follows: that is to say, that when superfine was eleven and twelve dollars, common flour would be

about nine dollars per barrel, and so in proportion, the difference being greater when flour was higher, and less when flour was lower; that the smallest difference the witness ever knew between superfine flour and common flour in the *New-Orleans* market was three dollars, and the difference between fine and superfine was about one and one half dollars per barrel, when the price was such as is above mentioned, and that difference increased and diminished according to the price of flour in the rates above mentioned; fine flour is inferior in value to superfine flour, and common flour inferior in value to fine flour. It was generally difficult to sell fine or common flour in the market at *Orleans*, but superfine flour had generally a ready sale. That witness had not been at *New-Orleans* since May 1811, and has no personal knowledge of the prices of flour, or the usages of trade since that period of time; that they could always obtain for flour of the *Baltimore* brand two or three dollars more than for flour brought down the *Mississippi* from the *Western Country*, and would always sell superfine flour for something, when fine and common flour could not be disposed of. And also offered to prove by another competent witness, that the said witness resided in *New-Orleans* in 1819, and was a clerk in a mercantile house at that place; that the price of merchantable flour was at that time $8 per barrel, and that merchantable flour, so called in the market of *New-Orleans*, were one third fine and two thirds superfine; that the prices of flour during the months of November and December 1819, and January and February 1820, were at $8 per barrel, and that prices fluctuated during the residue of 1819 from 50 cents to a dollar; that at the time above mentioned, flour which passed inspection at *New-Orleans* as common only, was of less value, and was worth in *New-Orleans* only five and a half dollars per barrel, when merchantable flour was worth $8 per barrel. Witness lived there from 1819 to 1822; that while the witness resided there flour which passed inspection as common flour was always inferior in value to merchantable flour as above described, and that when flour was high the difference was greater, and when lower the difference was less. And also offered in evidence by another witness, that the witness resided at *Zanesville* from 1811 to 1817, and left *Zanesville* on the 20th of

April 1817; that when he left *Zanesville* he was between 14 and 15 years of age, and the fall before he left there he was employed by several persons, in conjunction with two others, to make an enumeration of the inhabitants of the town of *Zanesville*. The flour from *Zanesville* was generally sent to the *New-Orleans* market, but was sometimes sold on the way, where a market offered, as at *Cincinnati*, *Louisville*, or other places. There was no public inspection for flour at *Zanesville* before or at the time when the witness left there. That at the time they were making the enumeration as above mentioned, they endeavoured to ascertain the amount of flour dispatched from *Zanesville*, and the witness made inquiries on that subject, but he was unable to ascertain it, and gave it up. That the father of this deponent was a physician, and in the habit of receiving wheat from his patients, which he somestimes sold to millers, sometimes had it ground into flour, and sometimes bartered the wheat or flour for such articles as he wanted; that there was very little money in the country, but flour generally had a ready sale for cash, because it was one of the articles usually sent to market to *New-Orleans;* but has no knowledge of any particular sale of flour having been made at *Zanesville*, and speaks only of what he generally understood to be the course of business in relation to flour, and as to what he has already stated in relation to the general destination of flour to *New-Orleans*. He has no personal knowledge on the subject, and no other knowledge than what he derived from the information of others, and from seeing boats frequently depart from *Zanesville*, which he understood from the boatmen, when he saw them taking their departure, to be destined for *Orleans*, and also from what he generally understood at *Zanesville* to be the course of the trade. He had frequent conversations with boatmen who were engaged in the trade on the river, and also had conversations with the young men who were employed to superintend the sale of flour, and his information as to the course of the trade, as above stated, is derived from these sources. To the admissibility of all which testimony, so far as the same refers or relates to the relative value of flour at *New-Orleans*, or so far as the same refers or relates to the relative value of the different qualities of flour at any place on the *Ohio*, other than at *Zanes-*

*ville*, the defendant objected. Of which opinion was the court, and refused to let the said evidence go to the jury so far as above objected to. Whereupon the plaintiff prayed the court to designate the particular sentences, passages, and parts of the testimony above stated, which were admitted and rejected. Which the court refused to do further or more particularly than is done in the above stated objection and opinion. To which opinion of the court, as stated in this exception, the plaintiff excepted.

9. After the plaintiff had closed the evidence in support of the issue on his side, all which is set forth in the several preceding bills of exceptions taken on the part of the plaintiff, the defendant prayed the instruction of the court to the jury, that to enable the plaintiff to support his action in this case, it is necessary that he should prove, by competent evidence, the comparative value at *Zanesville* of the flour contracted to be delivered, and of that which was actually delivered at the time specified in the covenant; that the difference between these values constitutes at once the proof of damage, and the measure of that damage; that the plaintiff has offered no proof of such comparative value, and that in the absence of all evidence of that comparative value, the plaintiff is not entitled to a verdict in this case. Which opinion and direction the court gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

*Scott*, for the Appellant, contended, 1. That the court below erred in not granting the *second* prayer contained in the *first* bill of exceptions; because the measure of damages was the difference of value at *New-Orleans*, at *the time of the inspection*, between the kind of flour contracted to be delivered, and the flour actually delivered as passed by the inspector of flour at *New-Orleans*.

2. That even if the court were right in refusing the *second* prayer contained in the *first* bill of exceptions; yet they erred in rejecting the evidence contained in the *second* bill of exceptions, and in the opinion therein expressed; because the evi-

dence contained in the *second* bill of exceptions was competent testimony to go to the jury, to prove the difference in value at *Zanesville*, between the flour stipulated to be delivered, and that which was delivered, at the time the flour was by the contract to have been delivered.

3. That the court below erred in not giving the opinion and direction prayed for by the plaintiff, as set forth in the *third* bill of exceptions; because, in the absence of all proof of the relative prices of superfine, fine, and common flour, at *Zanesville*, or at any other place on the *Muskingum* river, except at *Marietta*, the jury ought to have been permitted to take into consideration the relative value of the above mentioned qualities of flour at *Marietta*, it being the nearest point to *Zanesville* mentioned in the evidence.

4. That the court below erred in not giving the opinion prayed for by the plaintiff, as is set forth in the *fourth* bill of exceptions; because, in the absence of all proof of the relative value of superfine, fine, and common flour, at *Zanesville*, or at any other place on the *Muskingum* river, except at *Marietta*, the jury ought to have been permitted to take into consideration the relative value of the above mentioned qualities of flour at *New-Orleans*, with a proper allowance for the expences and risk of transportation. *New-Orleans* being a suitable and proper place for the inspection of the said flour.

5. That the court below erred in refusing to permit the evidence contained in the *fifth* bill of exceptions to go to the jury; because the evidence therein set forth was competent evidence to go to the jury, for the purpose of showing the value of superfine, fine, and common flour, at *Zanesville*, in 1817, at the time of the delivery of the flour mentioned in the *first* bill of exceptions; and that the kind of flour actually delivered was of no value for exportation.

6. That the court erred in refusing to permit the answer of *Maunsel White* to the plaintiff's *third* interrogatory to go to the jury, and in the opinion expressed in the *sixth* bill of exceptions; because the said answer was competent evidence to go to the jury, to show the difference in value between superfine, fine, common flour, and middling, at *New-Orleans*, in the spring of the year 1817.

7. That the court erred in refusing to permit the evidence contained in the *seventh* bill of exceptions from going to the jury; because the said evidence was competent testimony to go to the jury, to show the difference in value between superfine, fine, and common flour, at *New-Orleans*, in the spring of the year 1817.

8. That the court erred in rejecting the evidence contained in the *eighth* bill of exceptions, or any part thereof, and in refusing to designate the particular sentences, passages, and parts of the testimony, contained in this bill of exceptions, which were inadmissible; because the whole of the said evidence was competent to go to the jury—1st. For the purpose of showing the relative value of superfine, fine, and common flour, at *New-Orleans*, in the spring of the year 1817. 2d. For the purpose of showing its value at *Zanesville*. 3d. For the purpose of showing that there was no flour inspection at *Zanesville* in 1817. And lastly. For the purpose of showing the state of the flour trade on the *Mississippi*, and its tributary waters, in the year 1817.

9. That the court erred in granting the prayer and direction contained in the *ninth* bill of exceptions. 1st. Because it was not necessary that the plaintiff should prove the comparative value at *Zanesville* of the flour contracted to be delivered, and of that which was actually delivered at the time specified in the covenant. 2d. Because the difference in value at *New-Orleans*, at the time of the inspection, between the flour actually delivered, and that contracted to be delivered, constitutes the measure of damages sustained by the plaintiff, and not the difference between the relative values at *Zanesville*. 3d. Because the plaintiff did offer evidence of such relative value at *Zanesville*, as well as at *New-Orleans*. 4th. Because even in the absence of all evidence of that comparative value, the court should have left the issue made up between the parties to the jury, whose particular province it was to decide whether the defendant had fulfilled and performed his contract. 5th. Because there was a contrariety of evidence as to the quality of the flour. 6th. Because if the jury were not satisfied from the evidence that the flour actually delivered was such flour as the plaintiff was entitled to under the agreement, although there

might have been an absence of proof by which the measure of damages could have been ascertained; yet that the plaintiff would have been at least entitled to nominal damages. 7th. Because the burthen of proof was with the defendant to show that he had kept and fulfilled his covenant. 8th. Because the evidence shows that the flour actually delivered did not pass inspection according to the stipulation contained in the contract.

On the *first* bill of exceptions, as to the construction of the contract, he cited 2 *Bac. Ab.* tit. *Covenant*, (F) 76. 3 *Com. Dig.* tit. *Covenant*, (D 1,) 262. 1 *Phill. Evid.* 416. 1 *Pow. on Cont.* 385. 2 *Com. on Cont.* 532. *Harper vs Hampton*, 1 *Harr. & Johns.* 672. *De Sobry vs De Laistre*, 2 *Harr. & Johns.* 228. As to the measure of damages to be allowed for the nonfulfilment of the contract, he cited *Cannell vs* M'*Clean*, 6 *Harr. & Johns.* 297. *Downes vs Back*, 2 *Serg. & Low.* 407. *Bridge vs Wain*, *Ib.* 486. *Bracket vs* M'*Nair*, 14 *Johns. Rep.* 170. *Amory vs* M'*Greggor*, 15 *Johns. Rep.* 24.

On the *ninth* bill of exceptions, he cited *Douglass vs* M'*Allister*, 3 *Cranch*, 298. *Hurstford vs Wright*, 1 *Day's Rep.* 3. *Davis vs Davis*, 7 *Harr. & Johns.* 36. *Morris vs Brickley & Caldwell, (ante* 107.*)* *Stanard vs Eldridge*, 16 *Johns. Rep.* 254.

On the *second*, *fifth*, and *seventh* bills of exceptions, he cited 1 *Phill. Evid.* 209, (227,) *ch.* 8. *Ib.* 167, *ch.* 7, *s.* 6. 2 *Phill. Evid.* 45. 1 *Stark. Evid.* 398, 399, 400.

On the *eighth* bill of exceptions, he cited 3 *Stark. Evid.* 1252.

*Meredith*, for the Appellee. It is contended by the appellee, that he has kept his covenant, and performed the contract. He does not hold himself bound by the construction given by the court to the contract, as stated in the *first* bill of exceptions. That the contract, if it looks to an inspection at all of the flour, it was that it should be inspected at *Zanesville;* and if no public inspection there, then there was to be a private inspection. It never was intended that the flour was to be sent to *New Orleans* at the risk of the appellee For the purpose of this argument, however, it must be admitted by the appellee, that the court below gave a proper construction to the contract. The whole case

before this court is, what was the proper measure of damages? The contract is a written one, and it must be construed by the court. The measure of damages is legally incorporated into every contract; and the rule given by the court below, as to the measure of damages, was the proper rule. The defendant did not subject himself to the fluctuations of a foreign market. He stipulated to deliver the flour at *Zanesville*, and there he did deliver it. If he had failed altogether to deliver the flour, what would have been the measure of damages? Not what would be the price at *New-Orleans*, or any foreign market, to which the plaintiff might have intended to ship it; but the standard of value would be fixed at *Zanesville* at the time when the contract was to be consummated. *Chipman on Contracts*, 121, and the cases there referred to. *Shepherd vs Hampton*, 3 *Wheat.* 200. *Gainsford vs Carroll*, 9 *Serg. & Low.* 204. *Leigh vs Paterson*, 8 *Taunt.* 540, (4 *Serg. & Low.* 204.) 2 *Stark. Evid.* 645, 646. *Gilpins vs Consequa*, 1 *Peters' C. C. Rep.* 94. *Willings & Francis vs Consequa*, *Ib.* 172. *Smith vs Richardson*, 3 *Caine's Rep.* 219. But it has been said that the contract was not completed until after the flour was inspected at *New-Orleans*. The contract stipulates that the flour should be delivered at *Zanesville;* and it was delivered there to the plaintiff, who sent it to *New-Orleans*. Suppose the flour had been lost in its transportation, would the defendant be bound to supply other flour of the same or any other quality? If the measure of damage was the value of the flour at *Zanesville*, then the plaintiff should have produced evidence of what was the value at *Zanesville*. This he did not do; although such evidence might have been obtained. No evidence short of that required could be received.

If there ought to have been nominal damages in this case, this court, under the act of 1809, *ch.* 153, are authorised to amend the proceedings so as to give nominal damages.

*Taney*, in reply. The construction given by the court below to this contract on the first prayer of the plaintiff, is the true one. We must take it with its consequences. The contract was to deliver flour which should pass inspection, 1-3d fine, 2-3ds superfine. These latter terms imply a public inspection,

for private opinion could not pass the flour, as either fine or superfine. The purport of an inspection is to give an article a fixed character. The value of the flour was to be so fixed in the market by the intent and contract of the parties. The inspection was to influence the market value. This quality of fine and superfine to be fixed by inspection, was to be attached to the flour at *New-Orleans*, the only place for inspection; and was to be conclusive between the parties. We admit that the time and place of the breach, the difference in value then and there, will furnish the measure of damages. *Dillon* warrants the flour shall pass, and therefore he covenanted that *Williamson* might take the flour to *Orleans*, the usual place of inspection, where of course it was to pass. His, *D's*, covenant is of that extent. The flour does not pass; that is a breach of the covenant, not of delivery; but that it would pass inspection at *Orleans*. The time of the breach then, is the time of the inspection; the place, is the place of the intended inspection, and that was *Orleans*. It is a mistake to confine the breach to the mere delivery of uninspected barrels. We claim our damages, therefore, for the injury sustained at *Orleans* at the time of the inspection and discovery that our contract had been violated. Neither would it be correct to apply to the breach arising from a failure to pass inspection, the same measure of damages as for a nondelivery. In the latter case the purchaser, not having parted with his money, can replace the article, and the difference of price, at the place of delivery, would fully remunerate him. To this last case a failure to deliver stock sold to be delivered at a future day, is analogous; but the true measure of damages in this case is the equity which the purchaser has to reimbursement under its peculiar circumstances. *Bridge vs Wain*, 2 *Serg. & Low.* 486. 1 *Stark. Evid* 504.

The sufficiency of the evidence alone was for the consideration of the court; all the bills of exceptions might have constituted one. There is no one prayer as to the sufficiency of the evidence; but they all go as to the admissibility of the evidence. It is clear that the plaintiff could give, and that he did give evidence that the price of flour on the river was regulated by the price at *New-Orleans*, and he proved the relative value at each place, except at *Zanesville*. The evidence was cer-

tainly admissible, but whether sufficient or not, was another question, and which was for the jury to decide.

On the *eighth* bill of exceptions, he cited 1 *Stark. Evid.* 395. 3 *Stark. Evid.* 1241, 1245.

On the *ninth* bill of exceptions. Where there is a breach of the covenant by the defendant, there must be a verdict for nominal damages at least. The act of 1809, *ch.* 153, cannot authorise this court to amend the judgment. The judgment is for the defendant, and it may be amended so as to support that judgment; but by amending it by giving nominal damages to the plaintiff, would be to reverse the judgment.

MARTIN, J. delivered the opinion of the court. This was an action instituted to recover damages for the nonperformance of a covenant entered into between the parties on the 25th of January 1817, in the following words, (and which was signed and sealed by them:)—"Memorandum of an agreement entered into on this 25th day of January 1817, between *Moses Dillon*, of *Zanesville*, state of *Ohio*, and *David Williamson* of *Baltimore*, state of *Maryland*, whereby the said *Moses Dillon* obligates and binds himself to deliver to the said *Williamson*, or order, at *Zanesville*, two hundred and fifty barrels of flour, not less than one-third of same flour *to pass* as fine quality, the remaining two-thirds of superfine, *to be at said place by the first day of March next*, to be lined and in good shipping order; and *to deliver on the 15th of same month*, two hundred and fifty barrels of flour of same quality as the first mentioned quality, and in like order, to the said *Williamson*, or order, *at the above named place*, for which flour, *on its delivery as above*, the said *David Williamson*, Jr. binds and obligates himself to pay to the said *Moses Dillon*, or order, the sum of seven dollars per barrel, for which flour payment will be made to the said *Dillon* with his bonds passed to *Luke Tiernan* and *Kennedy Owen*, of *Baltimore*, interest being added in said bond to the day of *the delivery* of said flour, at the par of exchange. In testimony," &c.

In the trial of this cause, many exceptions were taken to opinions given by the court below; and without following the regular order, in which they appear, we will decide the points

that arise in them, and then apply the law to each exception respectively.

The true construction of this contract is the first question to be examined.

That the intention of the parties making a contract is to be regarded, and when practicable, carried into effect, is a fundamental rule in the construction of contracts. Where the agreement is in writing, and an ambiguity appears, not on the face of the paper, you may have recourse to extrinsic evidence to aid in its construction; but where its language is clear and explicit, the instrument must be construed according to its plain import and terms. In this case we see no ambiguity, and we think the agreement, on the face of it, clearly points out the intention of the parties contracting

The contract is for the delivery of a certain quantity of flour, of a particular quality; to be delivered—where? The contract expressly states, *at Zanesville*. When was it to be delivered? It is equally explicit that the first 250 barrels were to be delivered on the 1st of March 1817, and the remainder on the 15th of the same month, and *Williamson* stipulated that he would pay for the said flour seven dollars a barrel, *on its delivery as aforesaid*. But the flour, thus to be delivered *on the 1st and 15th of March at Zanesville*, was to be of a particular quality, and the agreement points out the evidence by which the quality shall be ascertained; it shall be such flour *as will pass inspection*, &c. The inspection was no part of the contract, *as it related to the time or place of delivery*, but only the evidence or test by which it was agreed the quality of the flour should be ascertained. Suppose on the day after the flour was delivered, *Williamson*, under an impression that it was not of such quality as was specified in the contract, had instituted a suit against *Dillon*, can it be doubted that such suit could be sustained, although the flour had not *then* been inspected, if *afterwards*, upon inspection, it would not pass? The moment the stipulated time for the delivery of the flour had passed, the contract was either performed or broken, and it was only necessary to carry it to *New-Orleans*, or any other place, for inspection, to furnish evidence of its quality.

With this explanation of the contract we are next to enquire

*at what time and place* the price of flour was to be the measure of damages; and with this view, it is necessary to consider, not only what the contract is, but what it is not. It is not a contract for the delivery of *stock*, and therefore the case of *Downes vs Back*, 2 *Serg. & Lowb.* 407, and the case of *M'Arthur vs Lord Seaforth*, 2 *Taunt.* 257, do not apply to it. By this contract the price was to be paid when the flour was delivered. It is not for affreightment, and, therefore, not within the doctrine laid down in *Bracket vs* M'*Nair*, 14 *Johns. Rep.* 170, and *Amory vs M'Greggor*, 15 *Johns. Rep.* 24, even if the authority of those cases had never been questioned; nor is it a contract for the sale and delivery of articles where *no time or place* is specified for the delivery, as in *Bridge vs Wain*, 2 *Serg. & Lowb.* 486. These are cases decided upon principles not applicable to the one now before us, and we look in vain to *them* to aid us in forming a correct opinion in this case.

It is believed that no case can be found where there was an agreement to deliver a *specific* article at a *particular time and place*, and the money to be paid at the time of delivery, that the value of that article, *at the time and place of delivery*, was not considered the measure of damages, unless where the contract showed it was for a particular purpose, and special damages were laid in the declaration. In *Chipman on Contracts*, 121, it is stated, "If property be sold at a particular price, to be delivered at a future day, and in the meantime the property rise, the purchaser is entitled to the rise of property; and if the property be not delivered, the value of the property, *at the time and place of delivery*, is the measure of damages." And in *Shepherd vs Hampton*, 3 *Wheat.* 200, "It was the unanimous opinion of the court, that the price of the article, *at the time it was to be delivered*, is the measure of damages." See also the case of *Leigh vs Patterson*, 4 *Serg. & Lowb.* 204. *Gainsford vs Carroll and others*, 9 *Serg. & Lowb.* 204, and *Cannell vs M'Clean*, 6 *Harr. & Johns.* 297.

The same rule, we think, will apply, where the damages are claimed, not for the nondelivery of the article, but for the delivery of an article of a *different quality* from that contracted to be delivered. The difference of price, *at the time and place*

*stipulated for the delivery* between the article delivered and that contracted for, is the measure of damages.

The case of *Gilpins vs Consequa*, 1 *Peters' C. C. Rep.* 86, sustains this position. That was an action brought to recover damages for the nondelivery of teas, of the *quality* contracted to be delivered, by *Consequa*, the defendant, to the supercargo of *Gilpins*. *Consequa* stipulated to deliver at *Canton* a cargo of tea for the *Pennsylvania* Packet, *to be fresh, prime, and of the first chop.* The tea was delivered, and carried first to *Philadelphia*, and afterwards to *Amsterdam*, where it was sold at public sale, according to the usage. From a comparison of the sales, it appeared these teas sold for less than some other teas of the same kind, which was attributed to their being of *inferior quality*. Judge *Washington* charged the jury, that as the contract was to deliver teas *at Canton* of a certain quality, they would consider the sales at *Amsterdam*, and the comparison of them with those of other teas, not as furnishing the *amount*, but the *rate* of loss; and having ascertained the rate, to apply it to the prices of the same articles of first quality at *Canton*, when these teas were delivered. And the learned judge, in illustration of this doctrine, stated—"If a man contract to deliver a quantity of flour, for instance, by a particular day, and fails, or deliver it of a quality inferior to that stipulated for, all that can be claimed from him in the first case, is the price of such flour *at* the *time and place* when and where it was to be delivered; or in the second, to make up the difference in quality." In the case of *Willings & Francis vs Consequa*, 1 *Peters' C. C. Rep.* 176, the doctrine laid down in the first case is recognized and adopted. Speaking of the rule in *Gilpins vs Consequa*, the Judge says, "with this rule the court finds no cause to be dissatisfied; and the reason of it is obvious, the contract is to deliver teas of the best quality *at Canton;* if it be not complied with, the price of such teas at that place, is the just measure of the damage sustained by the plaintiff."

But it is thought this rule, to ascertain the damages, will not afford to the plaintiff ample justice; he ought also to recover the amount of expenses necessarily incurred in transporting the flour to *New-Orleans* for inspection. The answer is, such was not the contract. If that had been a stipulation between the

parties, it should be found in the agreement. In its absence, this court can only act upon the contract as they find it, and apply to such contract the general established principles of law.

The next question is, whether the testimony offered by the plaintiff was admissible for that purpose?

Through the whole trial of this cause, the court of *Baltimore* county seems to have acted under the impression that no testimony was admissible to prove the relative price of flour at *Zanesville*, unless it was direct, positive proof, from a witness, who knew the value *at that place*; and that in the absence of such positive proof, the jury could not be permitted to establish that fact, by any other testimony. In this, we think the court erred. The evidence offered is not, as was contended, secondary evidence. It is of the same grade with that required by the court, although perhaps of a less conclusive character. Where testimony is offered, which of itself shows there is other evidence of a higher character, it is secondary evidence; as in the case of a written agreement—the copy is not admissible, until you first show the original cannot be had; because the copy of itself clearly proves, there is evidence of a higher character, which ought to be produced, unless its absence is accounted for. Not so, where the testimony is of the same grade, although it may not have an equal effect with the jury. The object to be attained in this case, was the relative value of flour at *Zanesville*, between that delivered, and that contracted for; and this might be proved either by a witness who knew the price of each kind of flour at *Zanesville*, or by showing the value at different places, by which the jury could judge of its relative value at *Zanesville*. The testimony, therefore, offered by the plaintiff, of the price of each kind of flour at *New-Orleans*, *Marietta*, and other places, was admissible, and ought to have been given to the jury.

The evidence offered in the *fifth* bill of exceptions was hearsay, and, therefore, properly rejected by the court. Some difficulty arises in forming a decision on this exception from the want of care in taking down the evidence. The witness, after stating that "he had purchased flour at *Zanesville* in the spring of 1817, and paid for it from six to eight dollars a barrel, and that he had paid for the freight of flour from *Zanesville* to

*New-Orleans* two dollars per barrel," said, that all the information he had as to the purchases and prices was derived from his brother and partner; but it is not distinctly mentioned whether the prices spoken of related to the price of flour alone, or was intended to include the price of both flour and freight from *Zanesville* to *New-Orleans*. From a comparison of the several parts of the testimony, we are led to the conclusion, that his knowledge of both was derived from the same source. He was not in the *Western Country* in the spring of 1817, nor did he make the purchases himself, but the whole business was transacted by his brother and partner.

The court were also right in not receiving the testimony in the *sixth* bill of exceptions. *Maunsel White*, the witness, stated, "that he was called on in the spring of the year 1817, by *Richard Relf*, to state the difference usually allowed on the sale of flour between superfine, fine, common and middling; *that he then stated* the difference was as follows," &c. This might be true, and yet he might have no knowledge of the facts. He only swears *he made the statement* to *Relf*, but he does not swear that statement was true, or that he either then knew, or ever did know, the facts to be as he stated them to *Relf*.

The testimony offered in the *seventh* bill of exceptions was hearsay, and, therefore, liable to the same objection with that contained in the fifth.

That part of the evidence in the *eighth* bill of exceptions that relates to the price of flour in *New-Orleans* in 1817, and that which was offered to prove there was no public inspection at *Zanesville*, at or *before* the time mentioned, ought to have been received; the residue of the testimony mentioned was properly rejected. The price of flour in 1811 and 1819, could not afford a correct standard to show its value in 1817.

We concur in the opinions given by the court below, in the *first*, *fifth*, *sixth*, and *seventh* bills of exceptions, and dissent from those in the *second*, *third*, *fourth*, *eighth*, and *ninth* bills of exceptions.

DORSEY, J. dissented from the opinions of the court below in the *first*, *third*, and *fifth* bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## CATHELL *vs.* GOODWIN.—June, 1827.

The drawer of a dishonoured bill, who neither at the time he drew it, nor when it was presented, had any funds in the hands of the drawee, nor such expectation of its payment as would induce a merchant of common prudence and ordinary regard for his commercial credit to draw a like bill, is not entitled to notice of such dishonour.

Where the defendant drew a bill in favour of the plaintiff's wife, and thus authorised her, in express terms, to receive its amount—the bill being presented by her, and payment refused, in an action on the bill by the husband, the defendant cannot deny the wife's right to demand its payment.

Whether or not the drawer of a bill had reasonable grounds to expect that his bill would be honoured, and the facts upon which that question arises are admitted or undeniable, it is exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal, or contradictory, then it becomes a mixed question, both of law and fact, in which case, the court hypothetically instruct the jury as to the law, to be by them pronounced accordingly as they may find the facts.

Under the money counts the plaintiff may recover, by evidence of the defendant's dishonoured bill, drawn payable to the order of the plaintiff's wife—the drawer, under the circumstances of this case, not being entitled to notice of the nonpayment of his draft.

APPEAL from *Baltimore* County Court. Action of *assumpsit* for money lent and advanced, paid, laid out and expended, and an *insimul computassent*. The defendant, (now appellee,) pleaded *non assumpsit*, and issue was joined. At the trial the plaintiff, (the appellant,) offered in evidence the following bill of exchange. "Mr. *Jno. Gooding*. Pay to the order of Mrs. *Matilda Cathell* five hundred dollars, and charge the same to your ob. st.

*Robt. M. Goodwin.*

$500. June 24th, 1818."

And proved it to be in the handwriting of the defendant, and payable to the plaintiff's wife. And further proved that the said bill was presented to the witness, the drawee of the bill, by Mrs. *Matilda Cathell*, at which time he refused to pay the bill; and at that time, and at the time the bill was drawn, the drawee had not in his possession any funds belonging to the defendant. And the said witness, the drawee, further proved, that at the time the bill was presented to him for payment, he told Mrs. *Cathell*, that if funds should afterwards come into his possession, which he shortly expected, he would pay said bill,

and that Mrs. *Cathell* left the witness without reply. That funds did afterwards come into the witness' hands, but the bill was not again presented to him for payment, and that if it had been, he would have paid it. And further proved that the defendant, when he drew the bill, was indebted to the witness, the drawee, but that notwithstanding he would have paid the draft when funds came into his hands; and that the said funds were all disposed of for account of the drawer of the said bill. Upon which the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover. Which instruction the Court, [*Hanson* and *Ward*, A. J.] gave to the jury. The plaintiff excepted. Verdict and judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued at the last June term, before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and DORSEY, J.

*R Johnson* and *Gill*, for the Appellant, contended, that under the circumstances stated in the bill of exceptions, no notice of the refusal of the drawee of the bill to pay it, could be required by the drawer. They referred to *Eichelberger vs Finley & Van Lear*, 7 *Harr. & Johns.* 381. 2 *Phill. Evid.* 10, 21.

*Meredith* and *R. B. Magruder*, for the Appellee, cited *Eichelberger vs Finley & Van Lear*, 7 *Harr. & Johns.* 381. *Chitty on Bills*, 268. *Bailey on Bills*, 239, 240, 241. *Rucker vs Hiller*, 3 *Campb.* 217. S. C. 16 *East*, 43. *Robins vs Gibson*, 3 *Campb.* 334. *Blackhan vs Doren*, 2 *Campb.* 503. *Clopper vs Union Bank of Maryland*, 7 *Harr. & Johns.* 92.

*Curia adv. vult.*

DORSEY, J. at this term delivered the opinion of the court. To support the opinion of the court below, the appellee's counsel have relied on three positions, (either of which, if tenable, would be sufficient for their purpose,) viz. 1. That Mrs. *Matilda Cathell* was not competent to demand payment of the bill. 2. That she consented to receive a conditional acceptance, and thereby gave time to the acceptor. 3. That the drawer had reasonable grounds to expect that his bill would have been honoured.

There is nothing to sustain the *first* position. The defendant has in express terms authorised Mrs. *Cathell* to receive the amount of the bill. To deny her the right to demand it, would be sanctioning an absurdity for the mere purpose of working injustice.

The *second* position is equally untenable. The facts stated in the bill of exceptions would not have warranted the jury in finding Mrs. *Cathell's* acceptation of a conditional acceptance of the bill, much less are they of that conclusive, resistless character which would authorise the court to assume the fact, to the ascertainment of which a jury only were competent.

The *third* position was that most obstinately contended for, which was conceived to be impregnably fortified by that part of the rule established in *Eichelberger vs Finley & Van Lear*, 7 *Harr. & Johns.* 381, which dispenses with notice only where *the drawer had no reasonable grounds to expect that his bill would be honoured.* The reasonableness of such expectation is matter for the court, and not for the jury, to decide. If the facts, upon which the question arises, be admitted or be undeniable, then the question becomes exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal or contradictory, then it becomes a mixed question both of law and fact, in which case, the court hypothetically instruct the jury as to the law, to be by them pronounced accordingly as they may find the facts. What are the facts to be found in this case justifying the drawer's expectation that his draft would have been paid? So far from having funds in the drawer's hands, he was his debtor—no proof of such a commercial intercourse between them as would imply a mutual credit—no previous promise by the drawee to accept this or any other draft for the drawer's accommodation—no consignment of goods to the drawee, which the drawer had any reason to expect would be received in time to meet his bill, but the only proof is, that the drawee informed the payee, that he expected funds of the drawer would shortly come to his hands, with which, when received, he would pay. That funds afterwards did arrive, but whether in one month, or five years after, does not appear. What may have been the expectations of the drawee, as to the receipt of funds from the drawer, is immate-

rial; they are not even admissible evidence in this cause. But if they were, they can have no influence on those of the drawer—into whose expectations only is the enquiry to be made. The facts in the cases of *Legge vs Thorpe*, 12 *East*, 170, and *Claridge vs Dalton*, 4 *Maule & Selw.* 226, afford much stronger evidence of a reasonable expectation in the drawers that their bills would be honoured, than those in the present case; yet there they were adjudged insufficient. The "reasonable grounds" required by law are not such as would excite an idle hope, a wild expectation, or a remote probability, that the bill might be honoured, but such as create a full expectation, a strong probability of its payment; such indeed as would induce a merchant of common prudence and ordinary regard for his commercial credit, to draw a like bill. The facts in this case constitute no such reasonable grounds. We therefore think that the county court erred in instructing the jury that the plaintiff was not entitled to recover, and consequently reverse their judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

## MURDOCK *vs.* WINTER's Adm'r.—June, 1827.

It is an established rule in pleading, that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance; as if a plea be bad, the defendant may avail himself of any substantial defect in the declaration, or if the replication be bad, the plaintiff may avail himself of any defect in the plea.

So where in an action on a promissory note payable four months after date, the defendant pleaded *non assumpsit infra tres annos*, to which the plaintiff replied, that he at the time of making the promise, was beyond seas and without the jurisdiction of the court, and so remained and continued, &c. and the defendant demurred—Judgment was rendered for the plaintiff; for that mode of pleading the act of limitations in this case, is defective.

The act of limitations begins to operate as a bar from the time the cause of action arises, and not from the time of making the promise.

APPEAL from *Charles* County Court. Action of *assumpsit*. The writ issued on the 11th of February 1822. The declaration contained a count on a promissory note, dated at *Boston* on the 15th of July 1816, for $88, payable in four months, with

interest, executed by the intestate of the defendant, (the appellee,) to the plaintiff, (the appellant.) The defendant pleaded *non assumpsit*, and *non assumpsit infra tres annos*. Issue joined on the first plea; and a replication to the second plea, stating that the plaintiff, at the time of making the promise, was beyond the seas, and without the jurisdiction of the court, and remained and continued, &c. Demurrer to the replication, and joinder in demurrer. The court ruled the demurrer good.

The plaintiff then prayed the court that the first issue be tried by the country. Which prayer the Court, [*Stephen*, Ch. J. and *Key*, and *Plater*, A. J.] refused. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, ARCHER, and DORSEY, J.

*Stonestreet*, for the Appellant, contended, 1. That the plea of *non assumpsit infra tres annos* is no answer to a declaration on a promissory note payable four months after date, as it might be true that the defendant did not assume at any time within three years before the issuing of the original writ, and still be liable. He should have pleaded *actio non accrevit infra tres annos*. That this objection is good on general demurrer, needs no authority to prove.

2. That the act of assembly of 1818, *ch.* 216, repealing the savings in favour of nonresidents, as given in the act of limitations, in its operation upon this case, is unconstitutional and void. The note in this case is dated in 1816, in *Boston*, where the plaintiff then resided, and continued so to reside until the issuing of the writ. The act of assembly taking away the savings in favour of nonresidents passed the 19th of February 1819, and therefore subjected the note to be defeated by the defendant's pleading the act of limitations

*C. Dorsey*, for the Appellee.

ARCHER, J. delivered the opinion of the court. It is an established rule in pleading, that upon the argument of a demurrer the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading

was first defective *in substance*. *Duppa vs Mayo*, 1 *Saund.* 285, *(note 5.)* *Chitt. Plead.* 647. As if a plea be bad, the defendant may avail himself of any substantial defect in the declaration, or if the replication be bad, the plaintiff may avail himself of any defect in the plea. Here the replication is demurred to, and although it may be defective, the plaintiff insists that the defendant has in his plea committed the first fault in pleading; and this objection leads us to the inquiry, whether the defendant's plea is maintainable?

The suit is instituted for the recovery of money due on a promissory note, payable in four months; the declaration is in the usual form, and to this declaration the defendant has plead *non assumpsit infra tres annos.*

This mode of pleading the statute of limitations is in many cases not available; and *Williams*, in his notes to *Hodsden vs Harridge*, 2 *Saunders*, 63, *(note* 6,*)* assigns as a reason, that if the cause of action accrued within six years, it is immaterial when the promise was made, because the statute operates as a bar only from the time the cause of action arose, and not from the time of making the promise, the words of the statute being "within six years next after the *cause* of action accruing," and not after, and he puts these cases in illustration of the principle. If a promissory note were made seven years ago to pay money within three years after, the statute is no bar; so if it were made seven years ago to pay money within three months after, though the statute would be a bar, yet the defendant must not plead *non assumpsit infra sex annos*, for that would be bad; but the plea must be *causa actionis non accrevit infra sex annos.* This last case is precisely the one presented here for our consideration, and must have the same rule applied to it; for the phraseology of the *English* statute, so far as concerns this point, is precisely in conformity with our statute of limitations. And it is recommended in the note referred to, as the safest and best mode in all cases of *assumpsit* where limitations attach to plead *actio non accrevit, &c.*

The plea then being substantially defective, the judgment of the court below should have been for the plaintiff upon this demurrer, instead of the defendant. And the court should have empannelled a jury to try the issue on the plea of *non assump-*

*sit*, which would have been the only issue before them, had their judgment been correct upon the demurrer to the replication.

This being our opinion upon the demurrer, the cause must be remanded to *Charles* county court by *procedendo*. And it is in this aspect of the case unnecessary to institute any inquiry into the very important point which has been raised by the appellant, whether the act of assembly, taking away from the plaintiff the savings of the statute, be constitutional, so far as respects his claim, which originated before the passage of the repealing law? Nor shall we venture to intimate any opinion on that subject, especially in this case which has been submitted to our consideration, without argument on the question.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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## DUVALL, *et ux. vs.* HARWOOD'S Adm'rs.—June, 1827.

An intestate had several brothers and a sister, who died before him, leaving children and grandchildren, and one brother who survived him, but who died before the distribution of the intestate's estate. In the distribution of the intestate's personal estate, it was decreed, that the children of his sister, and the children of each of his brothers, who died before him, should receive the share to which such sister or brother, if she or he had survived the intestate, would have been entitled, and to the exclusion of any grandchildren of such sister or brother of the intestate—such grandchildren being the children of a son or daughter of the said sister or brother of the intestate, and who died before him. And that the share of the brother who survived the intestate, is payable to the executor or administrator of such brother. An intestate died without descendants—a sister, and the children and grandchildren of several deceased brothers and sisters surviving him. Of one of the brothers no child was alive at the death of the intestate, but several of the grandchildren of that brother were then living, the plaintiff being one—Held, that he was not entitled to any part of the intestate's personal estate. (Note.)

APPEAL from a decree of the Orphans Court of *Anne-Arundel* County. The administrators of *Benjamin Harwood*, deceased, petitioned the orphans court to order a distribution of all the personal assets in their hands, amongst the legal representatives of the deceased, according to law. The orphans court, on the 26th of May 1827, having considered the petition, and being satisfied that the said *Benjamin Harwood* left, at the time of his death, one brother, *Richard Harwood*, who is

since dead, leaving children, and other descendants; and that *Thomas*, *William*, *Nicholas*, *John* and *Samuel Harwood*, who were brothers of the said *Benjamin*, and *Mary Stockett*, who was a sister of the said *Benjamin*, departed this life in the lifetime of the said *Benjamin*, leaving children, and other descendants; and it being proved to the court that the said *Richard Harwood* was indebted unto the said *Benjamin* in his lifetime in a large sum of money, and that the said debt is still due and owing, the court do adjudge and order, that the said *Richard's* distributive share of the said *Benjamin's* estate is not in any manner liable to the payment of the said debt. And the court, therefore, order that the said administrators do make distribution of the personal assets in their hands on the 4th of June next, and pay over the said assets as follows: One seventh part or share to *Richard Harwood* of *Thomas*, who is the only child of the said *Thomas Harwood*, brother of the deceased. One other seventh part or share to the legal representatives of the said *Richard Harwood*, deceased. One other seventh part or share to the legal representatives of the said *William Harwood*, deceased. One other seventh part or share to the legal representatives of the said *Nicholas Harwood*, deceased. One other seventh part or share to the legal representatives of the said *John Harwood*, deceased. One other seventh part or share to the legal representatives of the said *Samuel Harwood*, deceased. And one other seventh part or share to the legal representatives of the said *Mary Stockett*. And the court do consider that the legal representatives of the said *Richard*, *William*, *Nicholas*, *John*, *Samuel* and *Mary*, are their children, and that if any of the said children shall have died before the death of the said *Benjamin*, leaving children, or other descendants, the said children and descendants are, by representation, entitled to the share or shares to which their parent or parents would have been entitled, in case the said parent or parents had survived the said *Benjamin*. For example, the said *Nicholas Harwood* having died as aforesaid in the lifetime of the said *Benjamin*, leaving *Sarah Duvall* and *Mary Green*, daughters, and *Henry S. Harwood*, a son, and the said *Henry S. Harwood* having also died in the lifetime of the said *Benjamin*, leaving children, the court do consider and adjudge

the seventh part or share, before ordered to be paid to the legal representatives of the said *Nicholas*, shall be distributed—one third part thereof to the said *Sarah Duvall;* one other third part to *Mary Green*, and the remaining third part to and amongst the children of the said *Henry S. Harwood.* And in case any of the legal representatives of the said *Richard*, *William*, *Nicholas*, *John* and *Samuel Harwood*, and *Mary Stockett*, shall have died since the death of the said *Benjamin*, then the share of the representatives so dying shall be paid over to the person or persons who shall be entitled to distribution of the personal estate of the said representative.

From this decree *Lewis Duvall*, the husband of *Sarah Duvall* above mentioned, for himself, and his said wife, appealed to this court.

The cause was about to be argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J. by

*Marriott* and *Speed*, for the Appellants, when they were stopped by the court, who stated that the only question in the case which this court could act upon, had been decided in *Robins et al. vs The State use Polk, (a).—Decreed*, that the

*(a.)* The case of ROBINS, *et al. vs* THE STATE use of POLK was decided at June term 1809, on an appeal from *Worcester* county court. It was an action of debt on the administration bond given on the estate of *Zadok Purnell*, deceased. The following case was stated for the opinion of the court, viz Col. *Zadok Purnell* died intestate in January 1805, and without children or descendants of children. At the time of his death he left one sister living, and the legal descendants of three brothers and three sisters, who were dead, to wit, *John*, who had no child living at the death of the intestate, but who had seven grandchildren, one of whom is the equitable plaintiff *Thomas*, who left five children and four grandchildren. *William*, who left three children and one grandchild. *Arralanta*, who left four children and six grandchildren. *Zepporah*, who left eight grandchildren; and *Elizabeth*, who left seven children and three grandchildren. The question was, whether or not the equitable plaintiff was entitled to a distributive share of the personal estate of *Zedok Purnell*, deceased? The County Court, [*Done*, A. J ] gave judgment for the plaintiff. From which judgment the defendants appealed to this court. The cause was argued at the preceding June term before TILGHMAN, BUCHANAN, NICHOLSON and GANTT, J. by *Bullitt* and *Whittington*, for the Appellants, and by *J. Bayly* and *W. B. Martin*, for the Appellee; and at June term 1809, THE COURT, (except NICHOLSON, J.) dissented from the opinion of the court below; and

JUDGMENT REVERSED.

decree of the orphans court be reversed with costs to the appellants.—*Decreed* also, that in the distribution of the personal estate of *Benjamin Harwood*, the intestate, the children of his sister, and the children of each of his brothers, who died before the intestate, shall receive the share to which such sister or brother, if she or he had survived the intestate, would have been entitled, and to the exclusion of any grandchildren of such sister or brother of the intestate—such grandchildren being the children of a son or daughter of the said sister or brother of the intestate, and who died before the intestate.—*Decreed* also, that the share to which *Richard Harwood*, brother of the intestate, and who survived the intestate, but died before a distribution of his estate took place, is payable over to his executor or administrator, and not to his children, as directed by the decree of the orphans court—this court not meaning to interfere in any manner with the question of retainer by the administrators of *Benjamin Harwood*, for the claim they have, if any, against the said *Richard Harwood*, deceased, the proper parties not being before the court to justify them in deciding on that question.

DECREE REVERSED, &c.

SAUERWEIN *vs.* BRUNNER.—June, 1827.

A promissory note for $1,745, payable 90 days after date, made by B at the request of E, and for his accommodation, and by E taken to G, who endorsed it with E, and then delivered by G to M, who negotiated it with H for the sum of $1,648 08, which was paid to E, is void for usury.

Where a note commences in usury; or in other words, where a note is tainted with usury at its birth, when it first becomes legally efficient and operative so as to give to the holder a right of action upon it, no subsequent holder, for a valuable consideration without notice of such usury, can maintain a suit upon it—such note being declared by statute null and void.

A note endorsed for the accommodation of the maker, and passed by him as a security for a usurious loan, is a usurious contract in its inception; as the lender is in fact to be considered the first holder of the note.

The terms to negotiate a note, import the passing it for money; and to pass a note for money, means to transfer such note to another proprietor.

APPEAL from *Baltimore* County Court. *Assumpsit* by the holder, (now appellant,) against the maker, (the appellee,) of a promissory note, payable to *George J. Brown*, and by him en-

dorsed to *Martin Eichelberger*, who endorsed it to the plaintiff. The case is fully stated by the judge who delivered the opinion of this court.

The cause was argued at the last June term, before BUCHANAN, Ch. J. and MARTIN, STEPHEN, and DORSEY, J.

*Mayer*, and *Cruse*, for the Appellant, contended, 1. That the time at which the instrument, on which this action is founded, became a complete and perfect note, was a question of fact for the jury, and not a question of law, and, therefore, that the court below erred in giving the directions prayed to the jury.

2. That if it be a question of law, yet, on the first delivery of the said note by its maker to *Martin Eichelberger*, the person for whose accommodation it was drawn, it became a complete and valid note.

3. That as no usurious consideration passed between any of the said parties at the time of said delivery, no subsequent usurious loan made on said note could vitiate it, and that it was therefore valid in the hands of a subsequent *bona fide* holder for a full and valuable consideration.

They cited *Parr vs Eliason*, 1 *East*, 92. *Dagnall vs Wigley*, 11 *East*, 42. *Daniel vs. Cartony*, 1 *Esp. Rep.* 274. *Foltz vs Mey*, 1 *Bay's Rep.* 486. *Barclay, qui tam vs Walmsley*, 4 *East*, 55. *Bowyer vs Bampton*, 2 *Stra.* 1155. *Lowe vs Waller*, 2 *Doug.* 735. *Young vs Wright*, 1 *Campb.* 139, 141. *Ackland vs Pearce*, 2 *Campb.* 599. *Lowes vs Mazzaredo*, 1 *Stark. Rep.* 385, *(2 Serg. & Low.* 438.*) Wilkie vs Roosevelt*, 3 *Johns. Cas.* 66. *Jones vs Hake*, 2 *Johns. Cas.* 60. *Bennett vs Smith*, 15 *Johns. Rep.* 355. *Churchell vs Suter*, 4 *Mass. Rep.* 156. *Powell vs Waters*, 17 *Johns. Rep.* 181. *Marvin vs M'Cullum*, 20 *Johns. Rep.* 288. *Durham vs Dey*, 13 *Johns. Rep.* 40. *Munn vs The Commission Company*, 15 *Johns. Rep.* 44. *Smith vs Beach*, 3 *Day's Rep.* 268. *Ellis vs. Warn*, *Cro. Jac.* 33. *Burt vs Gwinn*, 4 *Harr. & Johns.* 507. *Jones vs Davison*, 1 *Holt's Rep.* 256, *(3 Serg. & Low.* 92.*) Lucas vs Latour*, 6 *Harr. & Johns.* 100.

*Mitchell, R. B. Magruder*, and *Kennedy*, for the Appellee, cited *Lowe vs Waller*, 2 *Doug.* 736. *Nevison vs Whitley*, *Cro.*

*Car.* 501. *Booth vs Cooke*, 1 *Freem.* 264. *Parr vs Eliason*, 1 *East*, 92. *Heylyn vs Adamson*, 2 *Burr.* 676. *Ackland vs Pearce*, 2 *Campb.* 599. *Munn vs The Commission Company*, 15 *Johns. Rep.* 44. *Powell vs Waters*, 17 *Johns Rep.* 176. *Marvin vs M'Cullum*, 20 *Johns. Rep.* 288. 2 *Stark. Evid.* 250. *Chitty on Bills*, 78, *(and notes.)* *Lansing vs Gaine*, 2 *Johns. Rep.* 303, 304. *Lowes vs Mazzaredo*, 2 *Serg. & Low.* 438. *Jones vs Davison*, 3 *Serg. & Low.* 99, *(note.)* *Webber vs Maddocks*, 3 *Campb.* 1, cited in *Chitty on Bills*, 132, b. 1 *Stark. Evid.* 414. *Bank of Utica vs Wager*, 2 *Cowen's Rep.* 763. *New-York Fire Insurance Company vs Ely*, *Ib.* 705, 706, 707. *Chitty on Bills*, 105, *(note.)* 100, *(note* 5.*)* *Tyson vs Richard*, 3 *Harr. & Johns.* 111.

*Curia adv. vult.*

STEPHEN, J. at this term, delivered the opinion of the court. On the trial of this case in the court below, the plaintiff, (now appellant,) gave in evidence the following promissory note: "*Baltimore*, Feb'y. 26th, 1819. Ninety days after date I promise to pay *George J. Brown*, or order, seventeen hundred and forty-five dollars, and twenty cents, for value received;" which note was signed by the defendant, (the appellee,) and was endorsed by *George J. Brown*, *Martin Eichelberger*, and the plaintiff, and proved the handwriting of the maker and endorsers respectively; and further proved, that the said promissory note was passed *bona fide*, and in the due course of trade, and for a valuable consideration, into the hands of the plaintiff; and here the plaintiff rested his case. Whereupon the defendant called *Martin Eichelberger*, whose name is on the note, who being released, was admitted to be a competent witness, who testified, that having been pressed for money, at the time this note was made, he applied to the defendant to lend him, for his sole accommodation, the defendant's note, to be negotiated in order to raise money for his use. He further proved by said witness, that the defendant complied with his request, and that he the witness applied, with the note, to *George J. Brown*, for a loan of money, which *Brown* agreed to make him upon the said note, and did accordingly lend the witness cash to the amount of $1,648 08, which was all that he ever

received for or on account of the said note. That *Brown* deducted for the use of the money loaned, $97 12, which the witness and *Brown* then understood to be the discount for interest, and for no other purpose. On being cross examined, the witness further said, that the note was drawn in blank, without the name of the payee inserted in it, when he passed it to *Brown*, having first inserted his name as payee, and that he considered *Brown* as the lender of the money, and not as his agent to procure a loan for him on the note, for a commission. That the note was first negotiated for the purpose of raising money at usurious interest. and that the above mentioned sum of $1,648 08, was paid by *Brown* to him, a few days after he had delivered the note to *Brown*.

The plaintiff then produced as a witness, *George J. Brown*, who testified that he had no recollection whatever of the said note, on which this suit was brought, other than from his name being endorsed thereon in his own handwriting; that he had no recollection of having discounted said note, or any other of said *Brunner's* notes, at usurious interest, his pecuniary affairs being then much embarrassed, so that he was compelled to scrape together all the means in his power for his own use; that he has discounted *Brunner's* note at bank for the use of the said *Eichelberger*, and that from his embarrassed situation at that time his memory might have been very inaccurate. The defendant then offered *John M'Fadon*, a competent witness, who stated that he did not particularly recollect the note in question, but that the memorandum, then shown to him, was in his handwriting, that it corresponded precisely with the note, and that he believes it related to that identical note. That the money mentioned in the memorandum, he remembered having received from one *Heidleback*, who paid it to him after deducting the usurious rate of interest, mentioned in the memorandum, and that he carried the money to *Brown*, and gave it to him with the memorandum. Whereupon the defendant prayed the direction of the court to the jury, that if the jury believed that the note in question was made for the purpose of raising money for the accommodation of *Martin Eichelberger*, and without any value being received by *Andrew Brunner*, and that it was passed by *Martin Eichelberger* to *George*

*J. Brown*, at a usurious rate of interest, then it was void, even if it passed afterwards, into the hands of a *bona fide* holder, and the plaintiff is not entitled to recover. And the defendant also prayed the court to direct the jury, that if they should believe that the said note was made by *Brunner* without consideration, for the accommodation of *Martin Eichelberger*, and by him was put into the hands of *George J. Brown*, that he might procure a loan of money thereon for said *Eichelberger*, and by *George J. Brown* was accordingly negotiated, to raise money, and that the sum of $1648 08 only, was raised thereon by *George J. Brown*, and paid over by him to *Martin Eichelberger*, then the plaintiff is not entitled to recover, notwithstanding he was not the lender of the money, but a subsequent holder for a valuable consideration, without notice of such previous usury. And the defendant further prayed the direction of the court to the jury, that if the jury should believe that the note was made by *Brunner*, without consideration, for the accommodation of *Martin Eichelberger*, and by *Martin Eichelberger* was put into the hands of *George J. Brown*, without any value paid therefor by *Brown*, that he might procure a loan of money thereon for *Martin Eichelberger*, and by *George J. Brown* was put into the hands of the aforesaid *John M'Fadon*, a broker, to negotiate to any purchaser, for the purpose aforesaid, who negotiated the same at a discount of $97 12, to one *Heidleback*, who became the first holder thereof for value, and that the proceeds thereof, after deducting the interest aforesaid, and his own commission as broker, was paid over by said M'*Fadon* to *George J. Brown*, who paid the same over to said *Eichelberger*, that then the said note was usurious and void in its inception, and the plaintiff not entitled in law to recover, notwithstanding the jury should be satisfied that he was not the lender of the money, but a subsequent holder for a valuable consideration, without notice of such previous usury. Upon these several prayers, the court *(a)* gave the instructions prayed for; and the plaintiff excepted. And the question to be decided by this court is, whether there is error in any of the opinions given by the court below? Upon an examination of the authorities relative to this subject, the principle seems

*(a.)* *Archer*, Ch. J. and *Hanson* and *Ward*, A. J.

to be well settled, that where a note commences in usury; or, in other words, where a note is tainted with usury at its birth, when it first becomes legally efficient and operative, so as to give to the holder a right of action upon it, no subsequent holder, for a valuable consideration, without notice of such usury, can maintain a suit upon it—such note being declared by statute null and void. In *Munn vs The Commission Company*, 15 *Johns. Rep.* 55, *Spencer*, Justice, in delivering the opinion of the court, says "the true test, in distinguishing between a case, where the discount of a bill, at a higher premium than the legal rate of interest, will be deemed legal, by considering it the purchase of a perfect bill, and where it will be illegal, as a usurious loan of money, is to ascertain whether the bill was a perfect and available bill to the party holding it." He says "the principle is too well settled to be questioned, that a bill, free from usury, in its concoction, may be sold at a discount, by allowing the purchaser to pay less for it, than it would amount to at the legal rate of interest, for the time the bill has to run. The reason is obvious; as the bill was free from usury, between the immediate parties to it, no after transaction with another person can, as respects those parties, invalidate it. And I take it to be equally clear, that if a bill, or note, be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are on it, can, as between themselves, maintain a suit on the bill when it becomes mature, provided it had not been discounted, that then such discounting of the bill would be usurious, and the bill would be void." This principle is also recognized and adopted by the court in *Powell vs Waters*, 17 *Johns. Rep.* 181.

The note in question was made by *Brunner* for the accommodation of *Eichelberger*, and no right of action ever grew out of it, or attached upon it, in favour of any holder, until it was discounted at a usurious rate of interest, either by *George J. Brown*, according to the statement of facts upon which the first prayer to the court was founded; or according to the statement contained in the second prayer, until it was discounted at illegal interest by the person to whom *Brown* applied as the agent of *Eichelberger;* or according to the statement of facts

contained in the third prayer, until it was discounted at unlawful interest by *Heidleback*, through the agency of *Brown*, for the benefit of *Eichelberger*. *Wilkie vs Roosevelt*, 3 *Johns. Cases*, 66.

It has been contended, that the facts upon which the *second* prayer was made to the court, if true, do not prove the contract to be illegal and usurious. That prayer is in the following words: "That if the jury should believe that the said note was made by *Brunner*, without consideration, for the accommodation of *Martin Eichelberger*, and by *Martin Eichelberger* was put into the hands of *George J. Brown*, that he might procure a loan of money thereon for *Martin Eichelberger*, and by *George J. Brown* was accordingly *negotiated* to raise money, and that the sum of $1648 08 only was raised thereon by *George J. Brown*, and paid over by him to *Martin Eichelberger*, then the plaintiff is not entitled to recover, notwithstanding he was not the lender of the money, but a subsequent holder for a valuable consideration, without notice of such previous usury." If the note was negotiated by *George J. Brown*, and the sum of $1648 08 only, was raised thereon, it certainly shows that the transaction was an usurious one. What is the import or meaning of the terms "to negotiate a note?" According to the meaning given to them by lexicographers, they import the passing a bill or draft for money, and that to pass a bill or draft for money, means to transfer such bill or draft to another proprietor. The prayer then in substance was, that if *George J. Brown* transferred *Eichelberger's* entire interest in this note, amounting to $1745 20, payable ninety days after date, and only raised by such transfer the sum of $1648 08, then the plaintiff was not entitled to recover. Can it for a moment be contended that such a dealing between the parties does not present a case of usury?

A note endorsed for the accommodation of the maker, and passed by him as security for an usurious loan, is an usurious contract in its inception, as the lender is in fact to be considered the first holder of the note. This principle is established in *Jones vs Hake*, 2 *Johns. Cas.* 60. The judge who delivered the opinion of the court, makes the following remarks: "The note in question was made by *Watkins*, and endorsed by the

persons whose names appear on it, for the accommodation of *Watkins* alone. No money was paid, or value given, by any of the endorsers. If the transaction be viewed in its true light, it was a contract made through the agency of *Haskin*, (who was a money broker,) between *Watkins* on the one part, and the person who loaned the money, and took the note as his security, on the other. The lender was in reality the first holder of the note, for the value given, whatever that may have been." He then says, "There can be no doubt, but that the contract was usurious, and the note therefore void."

DORSEY, J. dissented in part.

JUDGMENT AFFIRMED, *(a.)*

*(a.)* The rule that a negotiable instrument, which commenced in usury, is void, even in the hands of a *bona fide* holder, has been qualified by the act of 1824, *ch.* 200, which declares that nothing in the usury act of 1704, shall "destroy the right to sue and recover, by any legal or equitable assignee, endorsee, or holder of any bond, bill obligatory, bill of exchange, promissory note, or other negotiable instrument." Such persons having "received the same for a *bona fide* and legal consideration, without notice of any usury in the creation or subsequent assignment or negotiation thereof."

## OWINGS's Ex'rs. *vs.* OWINGS.—June, 1827.

A promise by a debtor to his creditor to pay his debt to a third person, will not enable such person to maintain an action at law, in his own name, for its recovery.

Where one person pays money to another for the use of a third, or where a person, having ready money belonging to another, agrees with that other to pay it over to a third, in both these cases an action may be brought in the names of the persons beneficially interested.

A promise to one to pay a sum of money to several other persons in equal portions, where it was not the intention of the contracting parties that such other persons should receive or recover by law, the entire sum, and then divide it among themselves, if the foundation of an action at all, will confer a right to maintain a separate action for each part.

Neither a devise of land, nor a legacy of a less amount than the sum due, is considered in law a satisfaction of a pecuniary debt.

It is not consistent with the policy of the law to encourage agreements, by which the right to administer on the estates of deceased persons, is declined in favour of one, who contracts to pay the declining party, for permission to administer, all the commissions allowed for the settlement of such estates, as in bad hands the practice might lead to gross violations of trusts, and the most pernicious consequences.

ERROR to *Anne-Arundel* County Court. *Assumpsit* for money lent; for money had and received, and on an *insimul computassent*. *Non assumpsit* pleaded, and issue joined.

At the trial the plaintiff, (now defendant in error,) offered evidence, that *Richard Owings*, the testator of the defendants, (now plaintiffs in error,) in his lifetime, proposed to the widow of *Beale Owings*, of *Baltimore* county, the mother of the plaintiff, that if she would decline taking out letters of administration on her deceased husband's estate, and permit him to obtain such letters, that upon the settlement of the estate he would pay to her all the commissions which should be allowed him by the orphans court for the settlement of said estate; that after the settlement of the said estate, and after the said *Richard Owings* had received and been allowed as aforesaid the sum of $1,069 63, as his said commission, it was agreed by and between the said *Richard* and the said mother of the plaintiff, that the said commission should not be paid to the said widow, but should be paid, with interest thereon, to the children of the said widow, viz. *Harriet Owings*, *Mary Owings*, and *Nathan Owings*, in equal portions; and the said *Richard Owings* promised and agreed with said widow to pay the same accordingly. That afterwards, upon the marriage of said *Harriet*, the said *Richard* paid to her the sum of $500, which he told her was the portion to which she was entitled. The defendants then offered in evidence the will of *Richard Owings*, dated the 17th of October 1818, containing, among others, the following devises, viz. "*Item.* I give and bequeath unto my two grandchildren, *Nathan H. Owings* and *Mary Owings*, children of my son *Beale*, all my tract of land lying in *Baltimore* county, on *Morgan's* Run, called *Point Espright*, and known by the name of *Lindsey's Meadows*, in equal portions to each of them, their heirs and assigns, forever, as tenants in common; also one hundred dollars to each of them, to be paid out of my personal estate." The defendants further proved by the person who wrote the will, that the devises and bequests made by the testator to *Nathan* and *Mary Owings*, were declared by him, at the time of making his will, to be made for the purpose of placing said *Mary* and *Nathan* on the same footing with *Har-*

*viet Iiams*, to whom he had already paid the sum of money proved as above mentioned to have been paid. The defendants then prayed the court to instruct the jury, that the plaintiff was not entitled to recover. And the Court, [*Dorsey*, Ch. J. and *Kilgour*, A. J.] instructed the jury, that if they believe the testimony offered on the part of the plaintiff, that the agreement on the part of the widow to relinquish her right to the administration on her deceased husband's estate, and the promise of *Richard Owings*, in consideration thereof, to pay the commissions to her, with his allowance and receipt of the sum of money, is a sufficient consideration to support an action of *assumpsit* therefor against the said *Richard Owings* by the said widow. That the subsequent agreement between the said *Richard Owings*, and the said widow, transferred to the said children such an interest in the money received as such commissions by *Richard Owings*, as to enable them to recover the amount thereof in an action of general *indebitatus assumpsit*. That the devise and bequest made by *Richard Owings* to the plaintiff, is not in contemplation of law a satisfaction of the plaintiff's claim, or any part thereof. The defendants excepted. Verdict and judgment for the plaintiff, and the defendants brought the present writ of error.

The cause was argued at the last June term, before BUCHANAN, Ch. J. and EARLE, STEPHEN, and ARCHER, J.

*Magruder*, for the plaintiffs in error, contended, 1. That the promise by their testator, stated in the bill of exceptions, was *nudum pactum*.

2. If for the promise there was such a consideration as would support an action at law, the action ought to have been brought in the name of the mother of the defendant in error, to whom the promise was made, and from whom the consideration moved.

3. If the suit could be brought by the children, they ought to have united in one suit, instead of bringing separate suits on one promise.

4. The devise to the plaintiff below, in the will of the testator, of the defendants, is a satisfaction of the claim set up in this action.

He cited, in his argument upon the above points, *Selw. N.*

*P.* 39, 40, 41, 45. *Crow vs Rogers*, 1 *Stra.* 592. 1 *Com. on Cont.* 26. *Toller*, 337. *Chaplin vs Chaplin*, 3 *P. Wms.* 247. 1 *Com. Dig.* 309, *(note.)*

*Shaw*, for the defendant in error, cited *Pow. on Cont.* 211, 206, 207. *Forth vs Stanton*, 1 *Saund.* 211, b. *Pillans vs Mierop*, 3 *Burr*, 1673. 1 *Com. Dig.* 310. *Partridge vs Partridge*, 2 *Harr. & Johns.* 63.

*Curia adv. vult.*

STEPHEN, J. at the present term, delivered the opinion of the Court. [After stating the case he proceeded as follows:] The question for this court to determine, is whether the court below gave a correct exposition of the law to the jury upon the prayer made to them? In deciding upon this case several questions present themselves for the consideration and adjudication of this court. *First.* Was there a sufficient consideration to sustain the promise made by *Richard Owings* to the mother of the plaintiff? *Secondly.* If there was, ought the suit to have been brought by the mother of the plaintiff, the promisee; or was the plaintiff, the person beneficially interested in that promise, competent to maintain the action in her own name? *Thirdly.* If she was competent to support the action in her own name, ought she not to have joined with her in the action her co-beneficiaries under said contract; or, in other words, was each of the children, who were intended to be benefited by said agreement, competent to support an action for their proportional interest? And *lastly.* Whether there is any thing in the said agreement between the mother and the grandfather, which it is contrary to the policy of the law to sanction or allow? As to the sufficiency of the consideration to support the promise, in 1 *Powell on Contracts*, 344, the law is laid down to be, in reference to this subject, that "a consideration may arise or be created by doing or permitting somewhat to be done to the prejudice or loss of one of the parties. So that it is not absolutely necessary that the consideration for a contract imports some gain to him that makes the contract; but it is sufficient that the party, in whose favour the contract is made, foregoes some advantage or benefit which otherwise he might have taken or had, or suffers some loss in consequence of placing

his confidence in another's undertaking." In illustration of this principle, in page 347, he refers to *Webb's* case, 4 *Leon.* 110, "where in an action upon the case the plaintiff declared, that whereas C. was indebted to J S, and J S to the defendant; the defendant, in consideration that the plaintiff would procure J S to make a letter of attorney to the defendant to sue C, promised to pay and give to the plaintiff £10. It was objected that here was not *any* consideration to induce the *assumpsit;* for that the defendant, by this letter of attorney, got nothing but his labour and travel; but the exception was not allowed of; because in this case, not so much the profit which redounded to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, was to be respected." So in the case now before this court, it is not so much the emolument which the defendants' testator derived from his undertaking or agreement with the mother of the plaintiff, that is to be regarded as the valuable and beneficial privilege which the promisee parted with in transferring to the defendants' testator her right of administration. In *Pillans vs Mierop*, 3 *Burr.* 1673, Mr. Justice *Yates* says, "any *damage* to another, or *suspension* or *forbearance* of his *right*, is a foundation for an undertaking, and will make it binding, though *no actual benefit* accrues to the *party undertaking.*"

As to the right of the plaintiff to maintain the action in her own name, in the case of *Schemerhorn vs Vanderheyden*, 1 *Johns. Rep.* 139, the court say, "we are of opinion that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise. This was the doctrine of the King's Bench in the case of *Dutton vs Pool*, affirmed in error. The same principle has since that time been repeatedly sanctioned by the decisions of the *English* courts"—*Vide* 3 *Boss. & Pull.* 149, in the notes to *Pigot vs Thompson.* In that case *Buller*, Justice, is stated to have said, "if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it." In the case of *Martyn vs Hind*, 2 *Cowper's Rep.* 443, Lord *Mansfield*, in speaking of the case *Dutton vs Pool*, reported 1 *Vent.* 318, and in 2 *Lev* 210, is reported to have said, "it is matter of surprise, how a doubt could have

arisen in that case. It was a promise to the father by a person in remainder, that if he would leave so much wood standing, he would pay his daughter £1000, the value of the wood, which the father had intended to cut down. The daughter, upon the father's death, brought an action for the £1000, and the court held she was entitled to bring the action. And upon error the judgment was affirmed." In the note to *Pigot vs Thompson*, 3 *Bos. & Puller*, 149, it is said, "with respect to the right of a third person to sue upon a parol promise made to another for his benefit, there is great contradiction among the older cases. But in *Dutton vs Pool*, the point seems to have been very fully considered, and very solemnly decided. There the father of the plaintiff's wife being seized of a wood, which he intended to sell to raise fortunes for his younger children, the defendant being his heir, in consideration that he would forbear to sell it, promised to pay his daughter, the plaintiff's wife, £1000, for which the action was brought; and it was held, that the plaintiff might well maintain the action. Which decision was affirmed in the Exchequer Chamber. In that case, indeed, some stress was laid upon the nearness of relationship between the plaintiff's wife and her father, to whom the promise was made; but another case has since occurred to which that reason does not apply;" and the case of *Martyn vs Hind*, above mentioned, is referred to.

But in this case the promise was made to the mother for the benefit of her children, and therefore the decision of the court in *Dutton vs Poole* is in perfect accordance with the judgment of the court below rendered in this case, as to the capacity of the plaintiff to sue in her own name, if the cases are analogous or can be assimilated in point of principle. In the case of *Dutton vs Poole*, there was nothing due from the son to the father, which the son promised the father he would pay to the daughter; in that case, as in this, there was no pre-existing debt due to the father from the son, upon which the promise could operate by way of transferring it as a *chose in action;* but it was simply an engagement, that if the father would forbear selling the wood in which the son had an interest as heir at law, he would pay the daughter the £1000, which it was the intention of the father to raise by selling the wood. In that case, then,

the original promise or undertaking was for the benefit of the daughter; the father at the time the promise was made had no claim whatever against the son upon which the promise for the benefit of the daughter was intended to operate, and consequently it could not be viewed in the light of an assignment of a *chose in action*. But in the case now under adjudication, the money had actually been received by the grandfather at the time the promise was made by him to the mother of the plaintiff; she had nothing more than a *chose in action*, which could only be reduced into possession by a suit at law. In the late edition of *Com. Digest*, 309, *(note* P,) will be found a most elaborate examination of most, if not all the authorities which have a bearing upon this subject. In that note, the author says, "There is nothing, however, illegal in transferring a contract unbroken, or even a debt due, the transfer is available in equity, and the assignor cannot afterwards sue upon the contract for money had and received, that being an equitable action, and he having no equity; nor can he afterwards release it, if the debtor knows of the assignment. If, too, where the assignee is about to sue upon it in his own name in equity, or in name of the assignor at law, the debtor promises to pay him if he will forbear; *(e. g.)* on the time of forbearance elapsing he may sue him in his own name. Here the suit, though in form on a new contract, is in effect founded on the old one as well, for the assignee thereby recovers what is due for the breach of it, which recovery bars the assignor's action; and in this indirect manner may a stranger to a contract sue thereon. A contract may be assigned by word of mouth, for this reason, if no other, that the transfer passes but an equity. It forms no exception to the rule, (that at common law simple contracts cannot be transferred by the owner,) that if A, having ready money belonging to B, agrees with B to pay it over to C, C may sue A for it in his own name, since the reason is, that by the agreement the money has changed owners, and A has become C's agent, as he was B's before. This case, and that where B pays money to A for the use of C, when C may sue for it, are in principle the same. However, to enable C to sue as above, it seems requisite that a specific sum of money, or what is equivalent thereto, has been deposited with A, upon which the as-

signment may operate; and that A's assent to pay C a debt due from himself to B, would be unavailing." This valuable note in *Comyn* has been more copiously extracted from on account of the clearness and perspicuity, with which the law upon this subject is therein laid down and explained. If in the case now before this court, the promise by *Richard Owings*, the grandfather, had been in the first instance to the mother, for the benefit of the children; or in other words, if he had promised the mother to pay the commissions to the children, in that case the promise would have enured for the benefit of the children, and upon the authority of *Dutton vs Poole*, the children might have supported an action in their own names; but it was not until after the money was received by him, and had become a debt due to the mother, that it was agreed between him and the mother, that it should be paid over to the children; and was consequently nothing more than a promise made by A, indebted to B, to pay C that debt; and no case has been found where it has been decided, that under such circumstances C could maintain the action in his own name; such a case being essentially different from the one where one person pays money to another, for the use of a third, or where a person, having ready money belonging to another, agrees with that other to pay it over to a third; in both which cases it is admitted the action might be brought in the names of the persons beneficially interested. As to the position that the devise and bequest operated as a satisfaction of the debt, it is considered not to be sustainable, because it is well settled, that a devise of land is not considered in law a satisfaction of a pecuniary debt, nor can the legacy in this case operate that effect, because it is of a less amount than the sum due; and even if the parol declarations of the testator, made cotemporaneously with the will, were admissible, which it is unnecessary to decide, there is no proof that possession had ever been taken of the land, or that the legacy had ever been paid. This court is further of opinion, that upon the evidence in this cause separate suits would have been sustainable by each of the children for their respective proportions, if the actions could have been brought in their names; it is not the case of a promise made to them jointly, but a promise made to their mother for their benefit by the defendant's testa-

tor, whereby he engaged to pay the money due to the mother, to her three children, *Harriet*, *Mary*, and *Nathan Owings*, *in equal portions*, so that it was not the intention of the contracting parties, that the children should receive or recover by law the entire sum, and then divide it among themselves, but that each should be paid his or her separate part by the grandfather; from whence it follows, that if a resort to legal process become necessary to enforce payment, each would have had a right to maintain a separate action for his or her part; provided the case had been such that suits could have been brought in their own names. It is not deemed necessary to go into an inquiry how far such agreements as the present ought to receive the countenance or sanction of the law, as the court do not discover in this case that the rights of any of the parties interested have been injuriously affected by the transfer of the right of administration; but it is certainly not consistent with the policy of the law to encourage such transfers as in bad hands, the practice might lead to gross violations of trusts, and the most pernicious consequences. From this view of the law governing this case, the court are of opinion that the judgment below ought to be reversed.

Archer, J. dissented.

JUDGMENT REVERSED.

## Taylor & M'Neal *vs* Phelps.—June, 1827.

Where a debt has been recovered by attachment in a foreign court, the recovery is a protection to the debtor, as garnishee, against his original creditor.

In the absence of any proof of fraud or collusion, the presumption is, that what is done under a foreign attachment, is rightly done, and that the claim of the attaching creditor is established to the satisfaction, at least of the court, in which the judgment of condemnation is obtained.

Foreign judgments are not conclusive when sought to be enforced by suits being brought upon them, they are then but *prima facie* evidence—may be impeached for irregularity, and rebutted by evidence.

The judgments of foreign courts of competent jurisdiction, when they come incidentally in question, as where they are relied upon by garnishees as a protection against the claims of their former creditors, have the force and effect of domestic judgments, and are conclusive

Appeal from *Baltimore* County Court. This was an action of *assumpsit*, brought by the appellants against *James Montan-*

*devert*, and *Henry Phelps*, surviving partners of *Jonathan O. Walker*, deceased. Upon the writ which issued, *Montandevert* was not arrested. The declaration contained two counts—one for money had and received, and the other on an *insimul computassent*. The defendant, (now appellee,) pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiffs offered in evidence an account rendered to them by the defendant, and his said partners, *(Montandevert, Walker, & Co.)* of sales of herrings, received at *Port-au-Prince*, by the latter from the former, made in January and February 1820, amounting to $933 67; and the amount of charges $473 96, being deducted, left due to the plaintiffs the sum of $459 71; which account was admitted to be in the handwriting of the defendant, and by him delivered to the plaintiffs. The defendant then offered in evidence the commission which issued in this cause to *Port-au-Prince*, on the 10th of April 1823, for the purpose of taking testimony, and documents and translations. The commissioners, by their return to the commission, stated that they had taken the deposition of *J. Mullery*, who, to the defendant's *second* interrogatory—"Are you, or are you not, acquainted with the laws of that part of *Saint-Domingo* in which *Port-au-Prince* is situate? If yea, state what is the law relative to attachments. And can or cannot the creditors of one man attach the funds of his creditor in the hands of a third person; and can he or can he not compel such third person to pay him the amount in such third person's hands belonging to such debtor?" Answered in the affirmative. To the defendant's *third* interrogatory—"If there be such a law, as before referred to, is it written law, or the common law of the country? If it be written law, annex a copy of the same, examined and compared by you with the original, to your answer hereto." He answered "it is a written law of which the annexed is a true copy. "To the defendant's *fourth* interrogatory—"Did or did not a certain *Frederick Kramer*, or some other person, lay an attachment on the funds of *Taylor* and *M'Neal*, in the hands of *Montandevert, Walker, & Co.* of *Port-au-Prince?* If yea, when was it done; and did the said *Kramer* get a judgment against said *Montan-*

*devert, Walker, & Co.* and for what amount; and was the same paid by them to him? He answered in the affirmative; and says, "the attachment was laid in January or February 1820, and judgment was obtained against whatever funds there might be in the hands of *Montandevert, Walker, & Co.* belonging to *Taylor* and *M'Neal*, not exceeding $797 50." To the defendant's *fifth* interrogatory—"Annex a copy of the proceedings compared by yourself with the original record in the attachment so laid in the hands of said *Montandevert, Walker, & Co.*" He answered "the annexed is a just and true copy of the original proceedings in this case, copied and compared by himself, from the original records." The deponent further stated "that attachments are served by the sheriff who keeps no copy of them, nor are they registered in any other office. That in this case he knows of the attachment being duly and legally laid by the said *F. A. Kramer*, on the property of *Taylor* and *M'Neal*, in the hand of the said *Montandevert, Walker, & Co.* and that in consequence thereof, and of the judgment subsequently obtained against the said *Taylor* and *M'Neal*, the amount of funds belonging to them in the hands of *Montandevert, Walker, & Co.* was paid over, or placed to the credit of the said *Kramer*, by *Montandevert, Walker, & Co.*" Then follows—[Seal.] "Extract from the records deposited at the office of the Civil Court, sitting at *Port-au-Prince.* We the subscribers, appointed arbitrators by Messrs. *Montandevert, Walker, & Co.* on one part, and Mr. *F. A. Kramer* on the other, in order to decide upon the differences existing between the said Messrs. *Montandevert, Walker, & Co.* and *F. A. Kramer*, concerning various debts due by Messrs. *Dennis* and *Brown*, of *Miragoane*, after having heard the two parties, and after having attentively examined the several documents relating to the business in contestation, are of opinion that the advance of the sum of seven hundred and ninety-seven dollars and fifty cents, made in the month of February last, to said Mr. *F. A. Kramer*, by Messrs. *Montandevert, Walker, & Co.* was not made to him but under his personal responsibility; and that the papers, establishing the debts of said Messrs. *Dennis* and *Brown*, were not deposited in the hands of Messrs. *Montandevert, Walker, & Co.* but to be used as collateral security; or further, that the

payment of the sums due by Messrs. *Dennis* and *Brown*, has not yet been made. We have adjudged, and do adjudge Mr. *F. A. Kramer*, to repay Messrs. *Montandevert, Walker, & Co.* in the space of four months from this date, the said sum of seven hundred and ninety-seven dollars and fifty cents. And in case it should be his intention to leave this Island before the expiration of the said term, he shall be held to furnish a good and solvent security that the present award shall be executed in all its force; on the other hand, Messrs. *Montandevert, Walker, & Co.* are held, on their part, to render every assistance in their quality of merchants, consignees, and patented, to facilitate the recovery of the debts due by *Dennis* and *Brown*. *Port-au-Prince, Haiti*, 7th September 1819. (Signed,) *Robert Golder, James Booth.*

Examined.—True copy.—*Detre Leon*, clerk.

"Code of civil proceedings. Title VII, of attachments or oppositions, article 557. Every creditor can, in virtue of titles which are of public authenticity or private, attach in the hands of a third person the sums or effects belonging to his debtor, or make opposition to their delivery. 558. If there are no titles, the judge of the debtor's residence, and even the judge of the place of residence of the third person, can, upon petition, permit the attachment or opposition.

"Extract from the minutes deposited at the registry of the civil tribunal sitting at *Port-au-Prince*. To the Dean and Judges of the Civil Tribunal sitting in this city, begs humbly Messrs. *Montandevert, Walker*, foreign merchants, established in this city, patented under No. 39, whose domicil is chosen in the study of the undersigned defender. See annexed an under date the 7th of the present month, by Messrs. *Robert Golder* and *James Booth*, merchants, residing in this city, requires that it please you to be willing to order by an ordinance put at the end of the present, that it will be authorised, and that it will issue in its full and entire effect—You will do well. *Port-au-Prince*, the 24th September, 1819.

Signed, *Mallery*, Def.

"Seeing the above demand in the name of Mr. *Montandevert Walker*, a foreign merchant, established in this city, patented under No. 39, asking the execution or confirmation of a

sentence awarded, which has been presented to us this day—We, *Henry Amedee Gayot*, Dean of the Civil Tribunal sitting in this city, order that the judgment awarded, made by the consent of the parties, between Mr. M*ontandevert Walker* and Mr. *F. A. Kramer*, by the arbitrators, *Robert Golder* and *James Booth*, shall be deposited at the registry of the court, and purely and simply shall issue to have its full and entire effect, in virtue of article one thousand and twenty of the code of civil proceedings. Given by us, Dean of the Civil Tribunal, *Port-au-Prince*, the 25th September 1819, the 16th year of Independence.

(Signed) *Gayot.*

"Extract from the registers of the registry of the civil tribunal sitting at *Port-au-Prince.* In the name of the Republic. The civil tribunal sitting at *Port-au-Prince*, competently united at the palace of justice, have rendered the following judgment: The tribunal, on the petition of Mr. *Walker*, present, assisted by Mr. M*allery*, public defender, granted the act to the said *Walker*, a foreign merchant, patented in this city, by the consent of Mr. *F. A. Kramer*, a foreigner, also present by summons, at the request of Messrs. M*antandevert, Walker & Co.* asking the execution of the awarded judgment of the 7th of September last, with the constraint of the body, which the said *Kramer* has required of the judges—as far as Messrs. M*ontandevert, Walker & Co.* foreign merchants, patented in this city, were authorised to pay themselves the amount of the condemnation pronounced by the awarded judgment of the 7th September of the last year, duly confirmed the 25th of the same month, out of the funds which they have in their hands belonging to Messrs. *Taylor &* M'*Neal*, for which the sum carried to the awarded judgment aforesaid has been borrowed. Given by us, *F. Abeille*, Judge, discharging the duties of Dean, *Neptune* and *Perpignand*, Judges at the Hall of Justice in ordinary audiance, on the 29th February 1820, the 17th year of Independence—We command, &c. In faith of which the present has been signed by the Judge *Abeille*, and the register.

(Signed) *F's. Abeille.*

*Armand*, Register.

Compared—for copy examined.

*Detre Lean*, Register."

Sworn to be true and correct translations by *Thomas W. Griffith.* The execution of the commission was admitted, and all errors in the pleadings were waived by consent of the parties. The defendant then prayed the court to instruct the jury, that the plaintiffs were not entitled to recover. Which instruction the Court, [*Archer*, Ch. J. and *Hanson*, A. J.] gave to the jury. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, and DORSEY, J.

*Gill*, for the Appellants, contended, 1. That the instruction of the court below was wrong, because the proceedings of the court at *Port-au-Prince*, set forth in the commission, established that no final judgment had been there rendered; that judgment was manifestly unfit to be adopted as final and conclusive. It did not contain a condemnation of *Taylor* and *M'Neal's* funds. It was a mere authority to *M, Walker, & Co.* to pay themselves a debt due from *Kramer*, out of *Taylor* and *M'Neal's* funds in their hands, as far as they (*M. W. & Co.*) were authorised; and how far they were authorised does not appear. The proceedings leaving the question of authority open, finally settled nothing; short of a final sentence of condemnation the proceedings on attachment were no bar.

2. The defence relied on arose from testimony offered by the defendant, he had therefore no right to assume its truth, and require of the court below, *an absolute instruction* to the jury, that the plaintiffs were not entitled to recover. Where the plaintiff or defendant requires an instruction from the court, on the testimony of the opposite party, it is like a demurrer to evidence, and admits the truth of the facts offered in proof, and reasonable inferences from them; in such case the instruction may be positive and conclusive, because, as the court have the facts admitted, the intervention of a jury is unnecessary; but where either prays an instruction *on his own proof*, the instruction, if granted, should be hypothetical, as if the jury believe the testimony; otherwise either party may at pleasure take the question of how far the testimony is true or false, from the jury. They are the exclusive judges of the credibility of the

evidence. The theory of our system has been invaded by this instruction; and a question of great importance in every case, was determined in this cause by the wrong tribunal.

3. There was evidence of collusion between the defendants and *Kramer*, from the benefit of which the court below debarred the plaintiffs by the positive and conclusive instruction given to the jury. The facts established a claim for the plaintiffs; the collusion affects the defence relied on. The sum due from *Kramer* to *M, Walker, & Co.* was borrowed on the "personal responsibility" of the former. This appears from the award in the commission. In the proceedings between *M, W, & Co.* and *Kramer*, (the former seeking execution of their award against the latter,) this same debt is said to be borrowed by *Kramer* for *Taylor* and *M'Neal*. There is not the slightest evidence to show that if *Kramer* did in fact borrow any sum for *Taylor* and *M'Neal*, that he disbursed it for their account. It does not appear that *Kramer* was the creditor of *Taylor* and *M'Neal*; the contrary results from the statement, that he borrowed money for them. It is unaccountable, but on the idea of collusion, that *M, W, & Co.* in endeavouring to enforce an award against *Kramer*, should suddenly by a new direction given to the proceedings, obtain judgment against *Taylor* and *M'Neal*, they not being indebted to *Kramer*. That *Kramer* was unable to pay, was manifest from all the documents; and this shows the reason of the combination. The evidence sufficiently raises the question of fraud; and it should have been left to the jury. Proceedings in a foreign attachment, though a good bar, must like all other matters be liable to impeachment for fraud.

4. Foreign laws are to be compared with the original, and sworn to be a true copy. 2 *Esp. Dig.* 439. Here there is no proof that the witness compared the copy. The answer of the witness to the *fifth* interrogatory is objected to, so far as the witness speaks of a judgment rendered. Foreign judgments are not conclusive. They may be examined into. *Barney vs Patterson's Lessee*, 6 *Harr. & Johns.* 202, 203. *Pawling vs Bird's Ex'rs.* 13 *Johns. Rep.* 206. It must be established that the court had jurisdiction over the case. Where the party to be affected by the proceedings is not present, the judgment is not

conclusive, nor is it evidence for any purpose. *Buchanan vs Rucker*, 9 *East*, 191, 192. *Owings & Cheston vs Nicholson & Williams*, 4 *Harr. & Johns.* 103, argument of Mr. *Pinkney*. The act of 1813, *ch.* 164.

*Meredith*, for the Appellee. The rule is well established, that where funds are attached for the debt of a person to whom the funds belong, the judgment is a bar. A person having the property of another, and pays it over by compulsion, is exonerated. *Le Chevalier vs Lynch*, 1 *Doug.* 170. *Allen vs Dundas*, 3 *T. R.* 125. *Hunter vs Potts*, 4 *T. R.* 187. *Sill vs Worswick*, 1 *H. Blk.* 669, 671. 683. *Philips vs Hunter*, 2 *H. Blk.* 408, 410. *M'Daniel vs Hughes*, 3 *East*, 367. *Embree vs Hanna*, 5 *Johns. Rep.* 101. *Holmes vs Remsen*, 4 *Johns. Ch. Rep.* 407. S. C. 20 *Johns. Rep.* 268. It is admitted that the judgment given in evidence in this case is properly authenticated. But it has been said that the judgment is examinable for irregularity. It is well settled, that if a foreign judgment comes collaterally as a defence in the cause, it is conclusive and unexaminable. *Cas. temp. Hardw.* 83. *Burrows vs Jemino*, 2 *Stra.* 733. *Roach vs Garvan*, 1 *Ves.* 159. *Tarleton vs Tarleton*, 4 *Maule & Selw.* 20. *Hamilton vs Moore*, 3 *Dall. Rep.* 372, 373, *(note.)* *Smith vs Lewis*, 3 *Johns. Rep.* 168, 169. *Grant vs M'Lachlin*, 4 *Johns. Rep.* 34. *Barney vs Patterson's Lessee*, 6 *Harr. & Johns.* 203. *Embree vs Hanna*, 5 *Johns. Rep.* 101. *Holmes vs Remsen*, 4 *Johns. Ch. Rep.* 467. There is no difference between a judgment in attachment, from a judgment in any other case. It may be inquired, 1. Was the court at *Port-au-Prince* a court of competent jurisdiction? 2. Does it judicially condemn the debt, which is the subject of the present action? 3. Is there any evidence of fraud or collusion as between the defendant and the attaching creditor?

1. The law of the place was produced in evidence; and if it was duly approved, it did authorise the proceeding by attachment. It cannot be doubted, but that *Kramer* was a creditor of the present appellants. Is the law properly proved? This may be done in one of two ways. It may be by an authenticated, or by a sworn copy. The witness does not say expressly that he examined the law; but it is to be presumed from the

interrogatory propounded, and his answer thereto, that it was a sworn copy. It cannot be doubted but that it is a sworn copy. If the law is out of the case, there is still sufficient *prima facie* evidence from the record, to show that the court had jurisdiction. A want of jurisdiction must be shown by him who contests it. *Molony vs Gibbons*, 2 *Campb.* 502. *Shumway vs Tilghman*, 4 *Cowen's Rep.* 292. This court will intend that the court of *Port-au-Prince* had jurisdiction over the subject matter, unless it is shown to be otherwise.

2. What does the judgment condemn? Although the record has been incorrectly translated, yet shows that *Kramer* was indebted to the defendant's house in $797 50, for money borrowed for the appellants on *Kramer's* own responsibility, with a collateral security of debts due to *Dennis* and *Brown*. Proceedings were had to enforce payment of *Kramer*. A reference was made to arbitrators, who awarded that *Kramer* should pay to the defendant's house a sum of money. The award was not complied with, and an execution was awarded against *Kramer*. *Kramer* then petitioned the court to authorise this debt to be deducted out of the funds in the hands of the defendant's house, belonging to the appellants; and this the court directed to be done.

3. No fraud appears in the transaction. Need not show a debt due to the plaintiff in the attachment. *M'Daniel vs Hughes*, 3 *East*, 367. Under our act of 1715, *ch.* 40, a person having funds in his hands belonging to his debtor, may attach the amount in his own hands to pay his own debt. The case at bar is not stronger, nor so strong, of a case of inferred fraud than our own laws sanction.

*Moale*, in reply. A judgment on a foreign attachment is only *prima facie* evidence of a debt, when it is to be enforced in this country. But it has been said, that when brought in incidentally it is then conclusive. The plaintiffs were never residents in *Port-au-Prince*, and had no notice of the proceedings, now attempted to be set up in bar of their action. There is no difference when a foreign judgment is offered as a set-off, and when it is to be enforced. This court did not, in *Barney vs Patterson's Lessee*, 6 *Harr. & Johns.* 202, say, that a foreign

judgment was conclusive when offered by way of set-off. There the judgment was offered in evidence as a link in the chain of the plaintiff's title. There can be no difference between a foreign judgment to be enforced, and where offered by way of set-off. *Owings & Cheston vs Nicholson & Williams*, 4 *Harr. & Johns.* 66, where all the parties were before the foreign tribunal, and yet this court decided that the judgment was not conclusive. In all the cases relied on by the counsel for the appellee, the parties affected by the foreign judgment were, or had been resident of the country in which such judgments were rendered, To make a foreign judgment on attachment, evidence for any purpose, it must appear that the defendant had been a resident or had been summoned. *Fisher vs Lane*, 3 *Wils.* 297. The record offered in evidence in this case does not show that the plaintiffs ever had been summoned, or had notice, or ever were under the jurisdiction of the court. Nor does it appear that any debt had been proved against them. *Buchanan vs Rucker*, 9 *East*, 194. *Borden vs Fitch*, 15 *Johns. Rep.* 121, 142, 143. To bind a person by a judgment he must be a party to the proceeding. There is nothing to show in this case that any proceeding was had by *Kramer* against the plaintiffs, so as to attach the funds of theirs in the hands of the defendant. Nor is there any thing to show that there was any process of attachment against the plaintiffs. The statute law of a foreign country must be proved by a copy, either properly authenticated, or sworn to be true. But the common law may be proved by parol evidence. Here there has been no legal proof of any law.

BUCHANAN, Ch. J. delivered the opinion of the Court. The facts of this case, as set out in the bill of exceptions taken at the trial, are in substance these: *F. A. Kramer*, upon his own responsibility, borrowed on account of the appellants $797 50, from *Montandevert, Walker & Co.* merchants at *Port-au-Prince*, who sued and obtained judgment against him for the amount so borrowed. To discharge himself from which, he sued out an attachment against the funds of the appellants, in the hands of *Montandevert, Walker & Co.* consisting of a balance of the proceeds of a shipment of herrings, amounting to $459 71, which he recovered by a judgment of condemnation

in the civil tribunal sitting at that place. For the amount so recovered, this suit was brought against the appellee, as surviving partner of the house of *Montandevert, Walker & Co.* and that recovery is relied upon as a full defence to the action.

No principle is now better established, than that where a debt has been recovered by attachment in a foreign court, the recovery is a protection to the debtor, as garnishee, against his original creditor. *Chevalier vs Lynch*, 1 *Doug.* 170. *Philips vs Hunter*, 2 *H. Blk. Rep.* 402. *Holmes vs Remsen*, 4 *Johns. Ch. Rep.* 460. S. C. 20 *Johns. Rep.* 229. *Embree & Collins vs Hanna*, 5 *Johns. Rep.* 101, are in point, with many others, proceeding upon the same principle, to which it is unnecessary to refer; and nothing could be more unreasonable and unjust, than that a person, who has been coerced by the sentence of a court of competent jurisdiction to pay a debt once, should be compelled to pay it a second time. It would be any thing but right and proper, and therefore not sanctioned in law. It may indeed be said to be hard, that a creditor should lose his money, without having had an opportunity afforded him of being heard, and perhaps in such cases, injustice is frequently done.

These attachments, however, are resorted to by such as claim to be creditors of those whose funds are sought to be affected; and when in truth they are creditors, no injury is in fact done to those whose debts are attached, being only an application of their funds in that form to the payment of their debts, to which they might be coerced by the attaching creditors in a different form. It is but the turning over one debt in discharge of another. And in the absence of any proof of fraud or collusion, the presumption is, that what is done is rightly done, and that the claim of the attaching creditor is established to the satisfaction at least of the court, in which the judgment of condemnation is obtained. Injustice may, and is sometimes, but not always done, in that *ex parte* form of proceeding; but in the case of a debtor, it would be extremely hard, that after having been made to pay the debt, by the authority of a court which he could not resist, he should be compelled to pay it over again; and in every such case, where he was not himself tainted with fraud, &c. injustice would be done. And it is not for us to complain of the effects of foreign judgments in attachment on the

rights of creditors here; our own attachment law has the same operation upon the rights of nonresident creditors.

The cases relied upon by the counsel for the appellants, to show that foreign judgments are not conclusive, are chiefly cases in which they were sought to be enforced by suits being brought upon them; and in such cases they certainly are not conclusive. The distinction is between the effect of a foreign judgment, when it is sought to be enforced by the party claiming the benefit of it, by bringing suit upon it, and when it only comes incidentally in question. In the former case it is not conclusive, but *prima facie* evidence only, and may be impeached for irregularity, and rebutted by other evidence. But in the latter, if it be by a court of competent jurisdiction, it has the force and effect of a domestic judgment, and the correctness of it cannot be examined into, but it is conclusive. This distinction was fully recognized and adopted in *Barney vs Patterson*, 6 *Harr. & Johns.* 182.

In this case the judgment of the civil tribunal at *Port-au-Prince*, does come incidentally in question, and is only introduced and relied upon by the appellee as a protection against the claim of the appellants, his former creditors, who are seeking to compel him to pay over again a debt, which under process of attachment he has once already been obliged to pay.

The jurisdiction of the civil tribunal at *Port-au-Prince* is not impeached, and however the fact may have been, there is no evidence in the record of any fraud or collusion having been practised. As far as appears to us, and we cannot look beyond the record, it was the common case of a creditor, attaching the funds of his absent debtor in the hands of a third person, and that is what is done every day in our own courts. And it would be thought very strange, and hard too, by a citizen of this state, if, after being obliged by a judgment in attachment in one of our courts to pay the amount of a debt due from him to a citizen of *Virginia*, he should on going into that state, be subject to be sued by his original creditor there, and made to pay the same debt over again; and that is exactly what it is sought to make the appellee do in this case, but which the law will not sanction.

JUDGMENT AFFIRMED.

## J. & C. BALTZELL *vs.* FOSS, *et al.*—June, 1827.

The lands of which G F died seized, on the application of his heirs, were sold under an order of the court of chancery, by a trustee appointed for that purpose, to J & C B, and the sale was ratified. The purchasers were creditors of J F, one of the heirs, and filed a petition setting forth their claim, the death of J F, that his children, who were minors, resided in *Illinois*, and praying an order of publication against them, and payment of their debt; it did not state that J F's personal estate was insufficient to pay his debts. The chancellor, without granting any order of publication, dismissed the petition at once. On appeal, it was held, that creditors may, by way of petition, instead of pursuing the accustomed course of an original bill, affect funds under the control of chancery upon the same terms that they might by bill, and that notwithstanding the defect in the petition in this case, the chancellor erred in deciding the merits of the petition without publication, or without an answer, and without setting it down for hearing; as the right existed the petition might have been amended, and the defect cured, if the proceedings had progressed to a hearing; and to enable the petitioners to subject the funds in question to the payment of debts, they must show either that no personal fund existed applicable to the extinguishment of their claims, or that they are insufficient for that purpose, and must, in addition, establish their claims in the customary method.

The acts of 1785, *ch.* 72, and 1794, *ch.* 60, *s.* 2, are in *pari materia*, and where proceedings are had under the one law or the other, to sell real property for the payment of debts, evidence of an insufficiency of assets will be required.

APPEAL from the Court of Chancery. This case, the facts of which are stated by the Judge who delivered the opinion of this court, was argued before BUCHANAN, Ch. J. and EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY. J. by

*Williams*, (District Attorney of *U. S.*) for the Appellants; and by

*Scott*, for the Appellees.

ARCHER, J. delivered the opinion of the Court. The representatives of *John Foss*, *Jacob Foss* and *George Foss*, minors, by *Mary Foss* their next friend, the said *Mary Foss* and the widow of *George Foss*, *jr. Ann Foss*, *Margaret Foss*, *Thomas Owens* and *Elizabeth* his wife, *Christiana Sadler*, *Joseph Foss* and *Catharine Foss*, the representatives of *George Foss*, of the city of *Baltimore*, applied to the court of chancery for the sale of the real estate of which *George Foss* died seized, alleging that some of the representatives were minors,

and that a sale would be conducive to their interest. The court of chancery having instituted such inquiries as were required by law for the purpose of ascertaining the value of the real estate of *George Foss*, and whether it would be conducive to the interest of the parties that it should be sold, decreed the sale of the real estate as prayed for by the petition, and appointed a trustee for that purpose, who in the execution of the trust committed to him, exposed the lands to sale, and reported to the court that *Jacob* and *Charles Baltzell*, (the appellants,) became the purchasers of certain portions of the real estate to the amount of $3335. This sale was ratified and confirmed by the court on the 24th of September 1825.

On the 26th of October following, *Jacob* and *Charles Baltzell*, the purchasers, by petition represented to the chancellor, that *Catharine Foss*, one of the heirs of *George Foss*, was indebted to them in the sum of $918 13, and that *John Foss*, *Joseph Foss* and *Catharine Foss*, three other heirs of *George Foss*, were jointly and severally indebted to them in a note for $1958 58, with interest from the 26th of December 1822, which claims were exhibited with the petition, and prayed the chancellor to order that the trustee should credit them on account of their purchases to the extent of their claims against the representatives entitled to a distributive share of the proceeds of the estate; which prayer was conditionally granted, and an order, in conformity thereto, was passed, directing the credit to be given, provided cause should not be shown to the contrary on or before the 20th of November 1824. Answers were filed to this petition by *Catharine Foss*, *Joseph Foss* and *Christiana Sadler*. No answer seems ever to have been filed by the representatives of *John Foss*, nor does it appear that a copy of the chancellor's order was ever served on them. In this state of the proceedings the chancellor dismissed the petition of *Jacob* and *Charles Baltzell*, on the 7th of January 1825. Afterwards the petitioners renewed their petition, praying, under the circumstances which they have stated, that their application should be reinstated, and that the chancellor would review his decree dismissing their petition. It alleged the payment of all the debts of *George Foss* by his executrix, before the application for the sale of his lands by his representatives—

averred that *John Foss* had died in the state of *Illinois*, and prayed publication against his legal representatives, who are parties to the bill; and they furthermore withdrew all application for a reimbursement from the amount of their purchases to the extent of any claim they had against all or any of the representatives of *George Foss*, except as against the children and legal representatives of *John Foss*.

No order for publication ever passed in conformity with the prayer of the petitioners; but the court, acting on the petition, decreed at once its dismissal, upon the ground that the petitioners' remedy was at law; and from this order an appeal has been taken.

This court are not aware of any remedy which the petitioners could have for the recovery of their claim against the heirs of *John Foss*, if his personal estate be insufficient to pay his debts, other than that which they have been pursuing. Unless there are personal assets, if they are left to law, they are entirely remediless. The law has pointed out no mode by which its process could reach these funds, which are in chancery for distribution. They may not, strictly speaking, be said to be in litigation, but they are under the control and power of a court of equity, whose jurisdiction, courts of law could not be permitted, by its process, to oust.

The act of 1794, *ch.* 60, *s.* 2, authorises the sale of the lands of nonresidents, which they shall derive by descent or devise, for the payment of the debts of the person from whom they descend, or by whom they are devised, and makes no provision relative to a deficiency of personal estate. But the act of 1785, *ch.* 72, requires that the personal estate shall be insufficient for the payment of debts before the real estate of the deceased shall be subjected to sale for their payment, and is general in its terms. The act of 1794, above referred to, is supplementary to the act of 1785, and is in *pari materia*. They must, therefore, be construed together; and evidence will be required, of an insufficiency of assets, where proceedings are had under the one law or the other.

The petitioners then, to entitle themselves to a favourable judgment, and to subject these funds to the payment of debts, must, before they can succeed, show, either that no personal

fund existed applicable to the extinguishment of their claims, or that they are insufficient for that purpose; and must, in addition, establish their claims in the customary method.

The petition is informally and untechnically drawn, and is indeed, defective in substance in not alleging one or the other of the above facts indispensable to give jurisdiction to the court in their final decree, and it would also seem to require amendment in its prayer, which designates the object it desires to attain.

It cannot, at this day, be questioned but that creditors may by way of petition, instead of pursuing the accustomed course of an original bill, affect funds situated as are these; yet unless the petitioners are the only creditors of *Foss*, they could not have the entire fund going to these representatives, applied to the extinguishment of the purchase. Such a course would be doing injustice to other creditors, if such existed; but they could be permitted, as on an original bill by a single creditor, to come in for their distributive share.

Notwithstanding the defects in the petition to which we have adverted, we conceive the court erred in deciding the merits of the petition without publication or without an answer, and without setting it down for a hearing. We cannot say, had the publication been ordered, or had it been refused merely without any decision on the merits of the petition, but that an amended petition might have been filed—the right existing to do so; nor can we say that the respondents might not have confessed all the necessary facts by answer, or failing to answer, upon an amended petition being filed and publication made, that the necessary proofs would not have been adduced to have enabled the chancellor to have decreed the application of these funds to the extinguishment, so far as they would go, of the debts of the deceased, and among the rest that of the petitioners. The order, therefore, of the chancellor, dismissing the appellants' petition, is reversed.

ORDER REVERSED.

AN

# INDEX

TO THE

# PRINCIPAL MATTERS

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ACKNOWLEDGMENT.
*See* Limitation of Actions.

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2. Where one person pays money to another for the use of a third person, or where a person, having ready money belonging to another, agrees with that other to pay it over to a third person, in both these cases an action may be brought in the names of the persons beneficially interested. *Ib.*
3. A promise to one to pay a sum of money to several other persons in equal portions, where it was not the intention of the contracting parties, that such other persons should receive or recover by law, the entire sum, and then divide it among themselves, if the foundation of an action at all, it will confer a right to maintain a separate action for each part. *Ib.*

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1. It is not consistent with the policy of the law to encourage agreements, by which the right to administer on the estates of deceased persons, is declined in favour of one, who contracts to pay the declining party for permission to administer, all the commissions allowed for the settlement of such estates, as in bad hands the practice might lead to gross violations of trusts, and the most pernicious consequences. *Owings's Ex'rs. v Owings,* 484

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1. When an amendment of the pleading is made at the trial under the act of 1809, *ch.* 153, *s.* 1, time is to be given during the term to the adverse party to prepare to support his case; yet the cause is not, therefore, to be continued, unless the court shall be satisfied that a continuance is necessary. *Union Bank of Maryland v Ridgely,* 324
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ANSWER IN CHANCERY.
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4. In all cases, where a complainant seeks a discovery and relief, and to make out his case applies himself to the conscience of the defendant, if in his answer the liability is once admitted, there can be no escape from it, but by proof; though every thing which he says with regard to the creation of that liability, must be taken together. *Ib.*

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2. The acts of assembly of 1785, *ch.* 72, and 1794, *ch.* 60, *s.* 2, are in *pari materia,* and where proceedings are had under the one law or the other, to sell real property for the payment of debts, evidence of an insufficiency of assets will be required *Baltzell v Foss, et al.* 504
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ASSUMPSIT.

1. After verdict in an action of *assumpsit* by an administrator, a defective allegation in the declaration, of the promise to the administrator, and the death of the intestate, and an omission to make *profert* of the letters of administration, cannot be taken advantage of; though they might have furnished good causes of demurrer. *Vandersmith v Washmein's Adm'r.* 4
2. W, being taken sick at the house of V, deposited in his hands a sum of money, and directed V to send for a physician, to furnish him with every thing that was necessary, and to apply the money to the payment of the physician's bill, and of any expenses which might be incurred on his account during his sickness. V did send for a physician, and furnished W with every necessary and attendance during his sickness, which in a few days ended fatally. On his death, V paid all the expenses, including the physician's bill. In an action of *assumpsit* brought against V by W's administrator, to recover the amount of the deposit—*Held*, that V was to be allowed for the amount paid to the physician, if it was such as he was entitled to receive, as well as the other expenses. That the fund placed in his hands by W, was to be considered as a special fund, and that in relation to it he was to be looked upon as a trustee, or agent, of the physician, for whose remuneration it was in part created; but that it would have been otherwise if V had received the deposit for safe keeping only. *Ib.* 6
3. When an agreement does not designate the person to whom its consideration is to be paid, the law will raise an *assumpsit;* and this is always implied in favour of those who are the meritorious cause of action, or from whom the consideration moves. *Higdon, et ux. v Thomas,* 139
4. The action for money had and received, is an equitable action, and equally as remedial in its effects as a bill in equity. *Murphy v Barron,* 258
5. If one man takes another's money to do a thing, and he refuses to do it, it is a fraud; and it is at the *election* of the party injured, either to affirm the agreement, by bringing an action for the nonpayment of the money, or to disaffirm the agreement *ab initio,* by reason of the fraud, and bring an action for money had and received to his use. *Ib.*
6. —— But where a vendor was exonerated from the delivery of a slave then out of his possession, whom he had sold and paid for, and afterwards persuaded or enticed to abscond, so that the purchaser never got possession of him, no action can be maintained upon the contract of sale for a nondelivery, or to recover back the purchase money, as money had and received by him to the use of the vendee. Either action could have been maintained, if it had been the vendor's duty to deliver the slave, and he had refused. The proper remedy here is a special action on the case for persuading or enticing the slave to abscond. *Ib.*
7. A promise by a debtor to his creditor to pay his debt to a third person, will not enable such third person to maintain an action of *assumpsit* in his own name for its recovery. *Owings's Ex'rs. v Owings,* 484
8. Where a person pays money to another for the use of a third person, or where a person having money belonging to another, agrees with that other to pay it over to a third person, in both these cases

actions of *assumpsit* may be brought in the names of the persons beneficially interested. *Ib.*

9. A promise to one to pay a sum of money to several other persons in equal portions, where it was not the intention of the contracting parties that such other persons should receive or recover at law the entire sum, and then divide it among themselves, if the foundation of an action at all, it conferred a right to maintain a separate action for each part. *Ib.*

*See* Declaration 2, 3.

ATTACHMENT.

1. Where a debt has been recovered by attachment in a foreign court, the recovery is a protection to the debtor, as garnishee, against his original creditor. *Taylor & M'Neal v Phelps*, 492

2. In the absence of any proof of fraud or collusion, the presumption is, that what was done under a foreign attachment, was rightly done, and that the claim of the attaching creditor was established to the satisfaction, at least of the court, in which the judgment of condemnation was obtained. *Ib.*

3. The judgments of foreign courts of competent jurisdiction, when they come incidentally in question —as where they are relied upon by garnishees as a protection against the claims of their former creditors, have the force and effect of domestic judgments, and are conclusive. *Ib.*

AUDITOR'S REPORT.

*See* Exceptions 1.

AUTHENTICATION.

*See* Statute of Frauds 1, 2, 3, 4.

AVERMENT.

1. Where it need not be averred in a declaration in an action against an administrator in his own right that he had assets in his hands of his intestate sufficient to pay the plaintiff's demand. *Giles, Adm'r. of Bacon, v. Perryman*, 164

*See* Declaration 1, 2, 4, 7, 8.

B

BAIL.

1. A writ of *scire facias* against *special bail*, which does not recite the issue and return of a *ca. sa.* against the principal, is sufficient upon issue joined on the plea of *nul tiel record*. *Cappeau's Bail v Middleton & Baker*, 154

2. — To such writ, the bail having pleaded the death of his principal before any *ca. sa.* returned, the plaintiff in his replication traversed that fact, and tendered an issue to the country. Its conclusion was technically right. An issue joined on such pleadings, is not an immaterial one—the whole matter in controversy being decided by it. *Ib.*

3. The omission of the plaintiff in his replication to set out the *ca. sa.* and return, in the proceedings against bail, is mere informality in pleadings, bad only on demurrer, and cured by verdict. *Ib.*

BANK.

*See* Corporation.

BARGAIN & SALE.

*See* Consideration 1, 2, 3.
—— Delivery 1.

BARON & FEME.

*See* Husband and Wife.

BEQUEST.

*See* Devise.

BILL OF COMPLAINT.

*See* Court of Chancery 2, 3, 4, 5, 6.

BILL OF EXCEPTIONS.

*See* Evidence 23.

BILL OF EXCHANGE.

1. The drawer of a dishonoured bill of exchange, who neither at the time he drew it, nor when it was presented, had any funds in the hands of the drawee, nor such expectation of its payment as would induce a merchant of common prudence and ordinary regard for his commercial credit to draw a like bill, is not entitled to notice of such dishonour. *Cathell v Goodwin*, 468

2. Where the defendant drew a bill of exchange in favour of the plaintiff's wife, and thus authorised her, in express terms, to receive its amount—the bill being presented by her, and payment refused, in an action on the bill by the husband, the defendant cannot deny the wife's right to demand its payment. *Ib.*

3. Whether or not the drawer of a bill of exchange had reasonable grounds to expect that the bill

would be honoured, (and the facts upon which that question arises are admitted or undeniable,) it is exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal, or contradictory, then it becomes a mixed question, both of law and fact, in which case, the court hypothetically instruct the jury as to the law, to be by them pronounced accordingly as they may find the facts. *Ib.*

4. Under the money counts the plaintiff may recover, by evidence of the defendant's dishonoured bill of exchange, drawn payable to the order of the plaintiff's wife—the drawer, under the circumsfances of the case, not being entitled to notice of the nonpayment of his bill. *Ib.*

*See* Promissory Note.

BILL OF SALE.

1. A bill of sale of a sheriff for chattels levied on and sold by him, is improper testimony in itself, however it may be considered, accompanied by proof of the sheriff's authority to sell the property it professed to convey. *Sanderson's Ex'rs. v Marks,* 252

BOND.

*See* Contract.
—— Recital.

BREACHES.

*See* Declaration 2.
—— Pleading.

C

CAUSE OF ACTION.

1. A receipt given of a sum of money borrowed, whereby the person borrowing undertook to return the money "when called on to do so," creates a cause of action from its date, bearing interest, and against which the act of limitations begins to run, from that time. *Darnall's Ex'rs. v Magruder,* 439

*See* Action & Action on the Case.

CHANCERY.

*See* Court of Chancery.

CHILDREN & GRANDCHILDREN

*See* Distributee & Distribution.

CHOSE IN ACTION.

*See* Husband & Wife.

COLLATERAL RELATIONS.

*See* Distributee & Distribution.

COMMISSION & COMMISSSIONERS.

1. The power conferred on a commissioner to take testimony is strictly personal. Especial confidence is presumed to be reposed in the person appointed, and he cannot delegate his authority. *Cappeau's Bail v Middleton & Baker,* 154
2. If the government of the place where a commission has issued to take testimony, will not permit it to be executed, the court here will issue *Letters Rogatory* for the purpose of obtaining tesmony. *Ib.* 157, *(note.)*

COMMISSIONS.

*See* Administration 1.
—— Court of Chancery 7.
—— Trust & Trustees 15.

COMMON RECOVERY.

*See* Estate Tail 1.

COMPETENT WITNESS & EVIDENCE.

*See* Corporation 1, 2.
—— Witness 2.

COMPOUND INTEREST.

*See* Trust & Trustees 13

CONSIDERATION.

1. Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration. *Betts, et ux. v The Union Bank of Maryland,* 175
2. The greatest extent to which the authorities have gone, has been to allow an *additional* consideration to be proved, which is *not repugnant* to the one mentioned in the deed; but where a deed is impeached for fraud, the party to whom the fraud is imputed, will not be permitted to prove any other consideration in support of the deed. *Ib.*
3. Ante-nuptial settlements made in consideration of marriage, are good, even though the party be then indebted. *Ib.*

CONSTRUCTION.

1. A court cannot be aided in the construction of any agreement by the acts which the parties may have done under it, nor is a party bound by any construction which he may

have put upon the instrument. *Ringgold v Ringgold,* 74

*See* Contract.
—— Descent.
—— Devise.
—— Limitation of Actions.
—— Statute of Frauds.

## CONTRACT.

1. In construing a bond the court must look to the intention of the parties at the time it was executed, and the contract must be expounded as the law was, when the contract was made. *Union Bank of Maryland v Ridgely,* 324
2. Where an act of incorporation, under which a bond was taken to secure the good conduct of one of the officers of the corporation, was limited in its duration to a certain period, the bond must have the same limitation; because the parties, looking to that act, it would seem to be very clear that no responsibility was contemplated beyond the period of its specified existence. The extension of the charter beyond the period of its first limitation by legislative authority, does not enter into the contract, and cannot enlarge it. *Ib.*
3. On the 25th of January 1817, D, agreed with W, under seal, to deliver to him or order at Z, 250 barrels of flour, not less than one-third of which to *pass* as fine quality, the remaining two-thirds of superfine, to be at said place by the 1st of March then next, to be lined and in good shipping order; for which flour, on its delivery as above, W bound himself to pay, &c. In an action of covenant on this contract the breach assigned being that the flour when delivered was sour, common, inferior, and of bad quality, and not in good shipping order, and would not and did not pass inspection as fine or superfine flour—*Held*, that the *inspection* was no part of the contract, as it related to the time and place of delivery, but only the evidence or test by which it was agreed the quality of the flour should be ascertained; that the moment the stipulated time for the delivery of the flour had passed, the contract was either performed or broken, and it was only necessary to carry the flour to a place for inspection, to furnish evidence of its quality; and that the difference of price at Z, at the time stipulated for its delivery, between the flour delivered and that contracted for, was the measure of the plaintiff's damages. *Williamson v Dillon,* 444
4. In an action on a contract to deliver a specific article at a particular time and place, to be paid for at the time of the delivery, the measure of damages is the same, whether the action be brought for a nondelivery, or a delivery of a different quality from that contracted for. The value of such article at the time and place of delivery, is the true measure; unless where the contract showed it was for a particular purpose, and special damages were laid in the declaration. *Ib.*
5. In proving the relative prices of different qualities of flour at Z, in 1817, other testimony is admissible than direct positive proof from a witness who knew the value at that place. In the absence of such positive proof the jury may infer such value, from proof of the price of each kind of flour in 1817, at other places in the neighbourhod of Z, and at N, a port to which flour was commonly sent from Z, for inspection and sale; and this latter species of evidence, which is admissible for the above purpose, is not secondary, though of a less conclusive character than direct proof. *Ib.*
6. A court cannot be aided in the construction of an agreement by the acts which the parties may have done under it, nor is a party bound by any construction which he may have put upon the instrument. *Ringgold v Ringgold,* 74
7. The owners of merchandize or other property, may sue in their own names on contracts of sale made by their agents, to whom express promises to pay have been made, and with whom the vendees dealt as sole owners of the property, having no knowledge of their principals. So also where one part owner sells, as his own, the property of his firm, all the partners may sue. *Higdon, et ux. v Thomas,* 153

*See* Agreement.
—— Promissory Note 1, 3.
—— Statute of Frauds 1, 2, 3, 4.
—— Usage 2.

CONVEYANCE.

1. A receipt for the purchase money, in a deed of conveyance of land, is only *prima facie* evidence of its payment. *Higdon, et ux. v Thomas,* 139
2. A tract of land may acquire, by reputation, a name different from that which it bears in the grant, and may pass by such acquired name. *Wall v Forbes,* 441

*See* Consideration 1, 2, 3.
—— Delivery 1.

CORPORATION.

1. It is a general rule of evidence, that in a suit brought by an incorporated bank, one who is a stockholder and interested in the event of the suit is not a competent witness in behalf of the institution; but that rule is not without exception—as where an interested corporator is called upon to prove himself either to be or to have been the depositary of the muniments of his corporation *Union Bank of Maryland v Ridgely,* 324
2. —— An interested corporator, however, is not a competent witness to prove that a book continued to be one of the muniments of his corporation after he had ceased to be the depositary thereof. *Ib.*
3. The adoption of a code of by-laws by a corporation need not necessarily be by writing, but may be proved as well by the acts and uniform course of proceedings of such corporation, as by an entry or memorandum in writing. *Ib.*
4. Where the plaintiffs in their replication set out a code of by-laws of their corporation, which prescribe the duties of an officer of the corporation, and then assigns as a breach a violation of duties so prescribed, on which breach issue is tendered by the defendant and joined in by the plaintiffs, such by-laws are virtually admitted by the defendant in his pleadings. *Ib.*
5. Where the defendant pleaded that he signed the supposed writing obligatory, upon which the action was brought, at the request of the principal obligor therein, and as his surety, and returned the same to him to be by him submitted to the obligees (a corporation,) for their approbation and acceptance; and if it should be approved and accepted by them, then it was to be considered and delivered as the act and deed of the defendant; and that it never was approved by the said obligees by any act in their corporate capacity, and so it was not his deed—*Held,* that in the absence of all evidence on the part of the defendant, the possession and production of the instrument of writing by the obligees was sufficient *prima facie* evidence of the delivery and acceptance, to entitle them to a verdict, on the issue joined on such plea. *Ib.*
6. It seems to have been formerly held, that a corporation aggregate could only act by its common seal; could do nothing without deed; but that doctrine is no where sanctioned as a universal proposition. *Ib.*
7. The acts of corporations may now be evidenced by writing without seal. *Ib.*
8. The assent and acts of corporations, like those of individuals, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence. *Ib.*
9. A corporation may be bound by the acts of its duly authorised agent, although such acts are not reduced to writing. *Ib.*
10. Where the charter of a bank required its cashier to give bond, with two or more sureties, to the satisfaction of the president and directors, and a bond, executed by the cashier, and others, as his sureties, reciting his appointment as cashier, was found deposited among the archives and valuable original papers and documents of the bank, in an iron chest in the banking house of the corporation, and the cashier had continued to act in that capacity for several years after the date of the bond, without any reappointment. In an action on the bond by the corporation—*Held,* that in the absence of all testimony respecting the execution of the bond, the jury ought to be permitted to infer that it was duly executed and delivered by the defendant and accepted by the plaintiffs, which acceptance necessarily included the approbation of the board of directors, or their satisfaction with the sureties, and was not necessary to be in writing. *Ib.*

11. Where the pleadings in a cause put in issue the facts that certain false and deceptious entries were made in the books of a banking corporation by its clerks, with the connivance of the cashier, on proof that the books were kept by the clerks of the bank, and the entries were in their handwriting, the books are evidence to show what entries were in them, which can only be done by their production, and are proper to lay a foundation for other testimony to show fraud, malconduct, neglect, or violation of duty by the cashier. *Ib.*

12. Where by the charter of a bank the directors were to be chosen annually, and they "for the time being, have power to appoint a cashier, and such other officers under them, as may be necessary for executing the business of said corporation," a cashier so appointed is an officer of the corporation, the duration of whose office, in the absence of an express limitatoin, s limited only by the duration of ihe charter, subject to the removal tof the incumbent by the directors as occasion might require; and is not necessarily an annual officer. *Ib.*

13. Where an act of incorporation, under which a bond was taken to secure the good conduct of one of the officers of the corporation, was limited in its duration to a certain period, the bond must have the same limitation; because the parties looking to that act, it would seem to be very clear that no responsibility was contemplated beyond the period of its specified existence. The extension of the charter beyond the period of its first limitation by legislative authority, does not enter into the contract and cannot enlarge it. *Ib.*

COSTS.

1. Where the chancellor's decree was entirely reformed in the appellate court, each party was decreed, in a case of cross appeals, to pay his own costs in that court. *S. & T. Ringgold v M. Ringgold, et al.* 11

2. The court of appeals will not grant a rule on an appellant who has removed out of the state since the appeal, to give security for the costs of suit. *Berry v Griffith*, 440

COURT.

1. A court cannot be aided in the construction of any agreement by the acts which the parties may have done under it, nor is a party bound by any construction which he may have put upon the instrument. *Ringgold v Ringgold*, 74

*See* Law & Facts.

COURT OF APPEALS.

1. Where the decree of the court of chancery was entirely reformed in the court of appeals, each party was decreed, in a case of cross appeals, to pay his own costs in that court. *S. & T. Ringgold v M. Ringgold, et al.* 11

2. The auditor's report may be excepted to in the court of appeals, and the whole accounts gone into, whether general or special exceptions, or no exceptions had been taken in the court of chancery. *Ib.* 67

3. Where the appellate court had reversed a judgment and awarded a *procedendo*, and it afterwards, during the same term, appeared that there was a material mistake in the record upon which they acted, they struck out the judgment, &c. and ordered a writ of diminution. *Raborg v Bank of Columbia*, 239

4. The court of appeals will not grant a rule on an appellant who has removed out of the state since the appeal, to give security for the costs of suit. *Berry v Griffith*, 440

*See* Appeal.

COURT OF CHANCERY.

1. As to the power, authority, responsibility, &c. of conventional trustees—See TRUST & TRUSTEES 1 to 16, and *S. & T. Ringgold v M. Ringgold, et al.* 11

2. A court of equity must always decree upon the allegations in the bill of the complainant, and it is not justified in going beyond them. As where he relies upon trusts in certain deeds, and complains of a violation of those alone, though the facts admitted by the defendants disclose the existence of other trusts, for which they are responsible to the complainant, yet that court cannot decree for such other rights—they must be reserved for future consideration. In order, however, to do justice between the parties, where the trus-

tees were bound to collect money and pay debts, the court will infer, in the absence of express proof, that the debts paid by them, after the receipt of money from the trusts not charged in the bill, were in fact paid out of such receipts. *Ib.*

3. It is a general rule, that an answer responsive to the bill of complaint, is evidence for the respondent; but the answer of a defendant, when it asserts a right affirmatively, in opposition to the plaintiff's demand, is not evidence. *Ib.*

4. An answer will not support a matter set up in avoidance or discharge, where the matter of avoidance is a distinct fact; in such a case, the defence must be proved. *Ib.*

5. On a general bill to account, the answer is no evidence of disbursements; such a bill is nothing more than a demand on the defendant, to show his receipts, and the legal sufficiency of his expenditures. *Ib.*

6. In all cases, where a complainant seeks a discovery and relief, and to make out his case, applies himself to the conscience of the defendant, if in his answer the liability is once admitted, there can be no escape from it, but by proof; though every thing which he says with regard to the creation of that liability, must be taken together. *Ib.*

7. By an equitable construction of, and by analogy to the statutes of this state, allowing commissions to executors, guardians, and trustees, under judicial sales, commissions may be allowed to conventional trustees, although there was no agreement between the parties to that effect. *Ib.*

8. Lands devised to be sold are thereby turned into money, and considered in equity as personal estate. A wife being entitled to the proceeds of such lands, dying after a sale of them, her husband surviving, is entitled to the proceeds thereof. *Hurtt v. Fisher,* 88

9. C & T drew a bill in favour of M, on D & B, partners in trade, which they accepted. M sued D & B at law on their acceptance, and pending the suit, D died. Judgment being had against B, he being insolvent obtained a discharge under the insolvent laws. P administered on D's estate, and received assets from his separate property to a large amount, though insufficient to pay D's individual debts, and also received some of the partnership funds. The judgment not being paid, and the partnership funds being insufficient to pay its debts, M filed a bill in equity against D's administrator, claiming to be paid out of the separate assets, an equal proportion with D's separate creditors—*Held,* that he was not entitled to recover. *M'Culloh v Dashiell's Adm'r.* 96

10. Joint creditors, in equity, can only look to the surplus of the separate estate, after payment of the separate debts. *Ib.*

11. Separate creditors, in equity, can only seek indemnity from the surplus of the joint fund, after the satisfaction of the joint creditors. *Ib.*

12. Where the claims of joint creditors do not come into conflict with those of the separate creditors, but only with the interests of the representatives of the deceased partner, equity will decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several. *Ib.*

13. At law the joint creditors may pursue both the joint and separate estate to the extent of each, for the satisfaction of their joint demands, without restriction from a court of equity; yet when by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, that court will give to the separate creditors all the advantages thus by accident thrown upon them. *Ib.*

14. The assets of insolvents are distributable according to equity. *Ib.*

15. Since the act of 1786, *ch.* 45, (to direct descents,) estates tail general, created since its passage, are converted into estates in fee simple, and are subject to be sold for the payment of debts, in the same manner as are estates in fee. *Newton, et al. v Griffith, et al.* 111

16. Whoever enters upon the estate of an infant, is considered in equity as entering as his guardian; and after the infant comes of age, he may by bill in chancery recover the rents and profits. If a person so entering shall continue the posses-

sion after the infant comes of age, chancery will decree an account against him as guardian, and carry on such account after the infancy is determined. *Drury v Conner*, 220

17. One who never occupied an estate, nor derived any advantage from it, but merely rented it out, and collected and paid over the rent as it came into his hands, as a friend or connexion of another, for whose use he received the rent, and to whom he was bound to pay it over as agent, is not responsible in equity, for *mesne profits*, to the owner of such estate. *Ib.*

18. It is true, as a general position, that chancery will not entertain a bill, where there is a full and complete remedy at law, and no ground is shown for going into equity; and ordinarily a bill for *mesne profits*, after recovery in ejectment, showing no obstacle at law, and stating no ground of equitable relief, would on plea or demurrer, and perhaps at the final hearing without either, under the practice in this state, be dismissed, there being an adequate remedy at law. *Ib.*

19. The auditor's report may be excepted to in the appellate court, and the whole accounts gone into, whether general or special, or no exceptions had been taken to it in the court of chancery. Per *Buchanan*, Ch. J. *S. & T. Ringgold v M. Ringgold, et al* 67

20. In equity money directed to be laid out in land, will before investment, be considered as land; and land directed to be sold and converted into money, will, before a sale, be considered as money, and pass as such. *Leadenham's Ex'r. v Nicholson, et al* 267

21. On an appeal from chancery, the appellate court decrees only in relation to the rights of those who are parties to the appeal. *Ib.*

22. The lands of which G F died seized, on the application of his heirs and representatives, were sold under an order of the court of chancery, by a trustee appointed for that purpose, to J & C B, and the sale was ratified. The purchasers, being creditors of J F, one of the heirs, filed a petition setting forth their claim, the death of J F, that his children, who were minors, resided out of the state, and praying an order of publication against them, and payment of the debt due to them. The petition did not state that the personal estate of J F was insufficient to pay his debts. The chancellor, without granting an order of publication, dismissed the petition. On appeal, it was held, that creditors may, by way of petition, instead of pursuing the accustomed course of an original bill, affect funds under the control of the court of chancery upon the same terms that they might by bill; and that nothwithstanding the defect in the petition in this case, the chancellor erred in deciding the merits of the petition without publication, or without an answer, and without setting it down for hearing; as the right existed, the petition might have been amended, and the defect cured, if the proceedings had proceeded to a hearing. And to enable the petitioners to subject the funds in question to the payment of debts, they must show, either that no personal fund existed applicable to the extinguishment of their claim, or that they are insufficient for that purpose; and must, in addition, establish their claim in the customary method. *J. & C. Baltzell v Foss, et al.* 504

23. The acts of assembly of 1785, *ch.* 72, and 1794, *ch.* 60, *s.* 2, are in *pari materia*, and where proceedings are had under the one law or the other, to sell real property for the payment of debts, evidence of an insufficiency of assets will be required. *Ib.*

*See* Husband & Wife 6, 7.
—— Trust & Trustees 17, 18, 19.

COVENANT.

*See* Warrant & Resurvey.

CREDITOR.

*See* Joint & Separate Creditors.

CUSTOM.

*See* Promissory Note 1.
—— Usage.

D

DAMAGES.

*See* Contract 3, 4, 5.

DATE.

*See* Delivery 1.

DAY.
*See* Pleading 18, 19.
—— Trespass 1.

DAYS OF GRACE.
*See* Promissory Note 1, 3.

DEBTOR & CREDITOR.
*See* Assumpsit.
—— Attachment.
—— Descents 1, 2, 3.
—— Joint & Separate Creditors.

DECLARATION.
1. After verdict in an action of *assumpsit* by an administrator, a defective allegation in the declaration of the promise to the administrator, and the death of the intestate, and an omission to make *profert* of the letters of administration, cannot be taken advantage of; though they might have furnished good causes of demurrer. *Vandersmith v Washmein's Adm'r* 4
2. In an action of *assumpsit*, brought by husband and wife, the declaration counted upon a contract for the sale of the wife's land recited in the bond for the conveyance of the land. It averred that the defendant was put in possession of the land on the day of making the contract, and afterwards accepted from the plaintiffs a sufficient deed, conveying to him the land in fee simple. It then assigned as a breach the nonpayment of the four last instalments mentioned in the contract, and concluded to the damage of the plaintiffs, &c. *Higdon, et ux. v Thomas,* 139
3. A declaration in *assumpsit*, which contains a count for matters and articles properly chargeable in account, as appears by a particular account filed—no account being filed; and another count for special services, which did not state an assumption of any particular sum, will not authorise a recovery. *J. & P. Turner v Jenkins, et al.* 161
4. Where a declaration sets forth a claim or demand of the plaintiff against the intestate of the defendant, and the intestate's promise to pay it—a reference of such demand by his administrator, (the defendant,) and the plaintiff, to arbitrators—an award, in pursuance of such reference, for a specific sum in favour of the plaintiff—a promise by the defendant, as administrator, to pay it, and charges a breach in the nonpayment of that sum, it contains matter enough, in an action against the defendant in his own right, to warrant a judgment against him in his character of administrator. The plaintiff is under no necessity to aver assets in the hands of the defendant, as administrator, sufficient to pay his debt. *Giles Adm'r. of Bacon v Perryman,* 164
5. —— This peculiar mode of declaring originated in a plan to save the act of limitations, and proceeds upon the ground, that it neither pledges the personal responsibility of the administrator after verdict, nor deprives him of any defence he could have had, if he had been charged with an *assumpsit* by his intestate; and with these qualifications, it will be received and adopted. *Ib.*
6. By the statutes of 21 *Jac. I. ch.* 13; 5 *Geo. I ch* 13, and the act of assembly of 1809, *ch.* 153, a variance between the writ and declaration is cured after verdict. *Ib.*
7. No form of words is necessary to be used in an averment in a declaration that the defendant is administrator; if enough is said to amount to an allegation, that the defendant administered on the estate of the deceased, it will suffice. *Ib.*
8. A declaration vicious on account of an averment obscurely made, is not such a fatal objection as will reverse a judgment. *Ib.*
9. The declaration in replevin should not include any property not taken under the writ of replevin. *Sanderson's Ex'rs. v Marks,* 252

*See* Contract 4.
—— Promissory Note 2.

DECLARATIONS.
*See* Evidence 10, 22, 23, 24, 25.
—— Limitation of Action.

DEED.
*See* Bargain and Sale.
—— Conveyance.
—— Delivery 1.

DELIVERY.
1. As a general principle of law, delivery is essential to the legal existence and validity of a deed; but our legislative enactment declares a deed, recorded within the time

prescribed by law, to be efficient and operative from the time of its date. *Betts, et ux. v The Union Bank of Maryland,* 175

*See* Escrow.

—— Gift 1.

DEMAND.

1. An instrument of writing for the payment of money *on demand*, creates a cause of action from its date, bearing interest, and against which the act of limitations begins to run from that time. *Darnall's Ex'rs. v Magruder,* 439

DEMURRER.

*See* Declaration 1.

DEPOSIT.

*See* Assumpsit 2.

DESCENTS.

1. Before the act of 1786, *ch.* 45, (to direct descents,) a devise of land by A to his son J, and his heirs, and other land to his son G, and his heirs; and in case either of them "*should decease, having no lawful issue, or heirs of his body,*" then the surviving son "to have his deceased brother's part of the land," to him and his heirs; and in case both sons "*should decease, leaving no lawful heirs of their bodies,*" then all the aforesaid lands unto the testator's three daughters, S, S & N, to be equally divided between them, would have vested in J and G each, estates tail general, in the lands respectively devised to them, with cross remainders in tail general, remainder to S, S & N, for life. But by the operation of that act, the devise being made in 1792, J and G took virtually estates in fee in the lands devised to them respectively; and on the death of G, without issue and intestate, J, and S, S & N, surviving him, J took by descent from him, one-fourth of his estate; and J also dying without issue, and intestate, that one-fourth, with the whole of the estate devised to him by his father, descended to his three sisters, S, S & N, as his heirs at law. *Newton, et al. v Griffith, et al.* 111

2. —— On a bill filed against S, S & N, as heirs at law of J—*Held*, that the land thus descended from J, was subject to be sold for the payment of his debts. *Ib.*

3. Before the act of 1786, *ch.* 45, estates tail were not liable for debts contracted by tenants in tail; but by that act, estates tail general, created since its passage, were virtually abolished, and converted into estates in fee simple, and have now all the incidents of lands held in fee—they are descendible, transferrable and devisable, and subject to be sold for the payment of debts, as estates in fee. *Ib.*

4. Estates tail general, divided, under the act of 1786, *ch.* 45, among heirs, taken by election, or sold by the commissioners, are held in fee simple. *Ib.*

5. By the act of 1786, *ch.* 45, lands held in fee simple, and fee tail general created since its commencement, descend first to the child or children of the intestate, and their descendants, if any; and if no children or descendants, to collaterals indefinitely. *Ib.*

6. The legislature having a right to prohibit the creation of estates tail, must have a right to direct in what manner lands so held by subsequent creation, should descend. *Ib.*

7. A dying intestate means a dying without making a valid and operative disposition by will. *Ib.*

8. Estates tail general, created before the act of 1786, and estates tail special, are excepted from the operation of that act. *Ib.*

*See* Husband and Wife 4.

DESCRIPTION.

*See* Ejectment 3, 4.

—— Fieri Facias 1.

DEVISE.

1. The proceeds of lands devised to be sold are turned into money, and considered in equity as personal estate. *Hurtt v Fisher,* 88

2. Before the act of 1786, *ch.* 45, (to direct descents,) a devise of land by A to his son J, and his heirs, and other land to his son G, and his heirs; and in case either of them "*should decease, having no lawful issue or heirs of his body*, then the surviving son to have his deceased brother's part of the land," to him and his heirs; and in case both sons "*should decease leaving no lawful heirs of their bodies,*" then all the aforesaid lands unto the testator's three daughters, S, S & N, to be equally divided between them,

would have vested in J and G each, estates tail general in the lands respectively devised to them, with cross remainders in tail general, remainder to S, S & N, for life. But by the operation of that act, the devise being made in 1792, J and G took virtually estates in fee in the lands devised to them respectively; and on the death of G, without issue and intestate, J, and S, S and N, surviving him, J took by descent from him one-fourth of his estate; and J also dying without issue and intestate, that one-fourth, with the whole of the estate devised to him by his father, descended to his three sisters S, S and N, as his heirs at law. *Newton, et al. v Griffith, et al.* 111

3. The words "without issue" in a will, when applied to dispositions of real estate, *ex vi termini*, mean an indefinite failure of issue, if there be nothing in the will restricting it to a failure at the time of the death of the first devisee, or to some other time or event. *Ib.*
4. To have no issue—to die having no issue—and to die without issue, are technically and judicially convertible terms. *Ib.*
5. The words *leaving*, *having*, and *without*, in devises—as "if he shall die without *leaving* any issue"—"without *having* issue," or "*without* issue," have acquired a technical judicial sense, and when applied to real estate, mean an indefinite failure of issue. *Ib.*
6. In dispositions of personal property, the courts generally incline to the construing a limitation after a dying without issue, to mean a dying without issue at the death of the first legatee, in order to support, if they can, the limitation over; yet in relation to real estate, the construction is generally otherwise. *Ib.*
7. The circumstance of a limitation over, being to a survivor, and his heirs, or only of a life estate, to a person *in esse*, has not the effect, in dispositions of real estate, in either case, to restrict the established legal meaning of the words "leaving no lawful heirs of their bodies," to a failure at the death of the first taker, or survivor. *Ib.*
8. If there be a devise to one generally of freehold and personal estates without any words of limitation, he will take an estate for life only, in the freehold, but the personal estate absolutely. *Ib.*
9. Since the act of 1786, *ch.* 45, estates tail general, created since its passage, are devisable in the same manner as estates in fee simple *Ib.*
10. Neither a devise of land, nor a legacy of a less amount than the sum due to the devisee or legatee, is considered in law a satisfaction of a pecuniary debt. *Owings's Ex'rs. v Owings*, 484

DIRECTION OF THE COURT.

*See* Law and Facts.

DISMISSAL.

*See* Appeal 4.

DISTRIBUTEE & DISTRIBUTION.

1. An intestate had several brothers and sisters, who died before him, leaving children and grandchildren; and one brother who survived him, but who died before distribution was made of the intestate's estate. In the distribution of the intestate's personal estate, it was decreed, that the children of his sister, and the children of each of his brothers, who died before him, should receive the share to which such sister or brother, if she or he had survived the intestate, would have been entitled, and to the exclusion of any grandchildren of such sister or brother of the intestate—such grandchildren being the children of a son or daughter of the said sister or brother of the intestate, who died before him. And that the share of the brother who survived the intestate, is payable to the executor or administrator of such brother. *Duvall, et ux. v Harwood's Adm'rs.* 474
2. An intestate died without descendants—a sister, and the children and grandchildren of several deceased brothers and sisters surviving him. Of one of the brothers no child was alive at the death of the intestate, but several of the grandchildren of that brother were then living, the plaintiff being one—*Held*, that he was not entitled to any part of the intestate's personal estate. *Ib.* 476, (*note.*)

*See* Insolvent Debtor 1.

—— Joint and Separate Creditors.

DOWER.

*See* Alien 1.
—— Feme Covert 1, 2.

E

EJECTMENT.

1. The lessor of the plaintiff in ejectment died pending the action, and his heirs at law were made parties in his place, without objection, and the cause continued several terms, and the plots amended—*Held*, that it was not competent for the defendant to defeat the action, by giving evidence that one of the heirs was an infant when she was made a party; and, that evidence that she was an infant at the time of the trial, would not entitle the defendant to a verdict against the other heirs who were of full age. *James, et al. Lessee, v Boyd,* 1
2. In an action of ejectment, the plaintiff obtained judgment against the *casual ejector*, and possession by writ, under that judgment. At the second term thereafter, the landlord of one of the tenants in possession, moved the court to set aside the judgment, &c. A rule was granted for the plaintiff to show cause, &c. At the next term the court set aside the judgment, awarded restitution as prayed, permitted the landlord to appear, ordered the action to be reinstated on the docket, and regular continuances to be entered therein. At this stage of the proceedings, the plaintiff moved the court for a reconsideration, and to set aside the order for restitution, as unduly obtained. This being refused, the plaintiff appealed—*Held*, that the setting aside a judgment against a *casual ejector*, on motion of the landlord of the tenant in possession, awarding restitution of the premises, and ordering the action to be tried, is but an interlocutory proceeding, from which an appeal will not lie; and the refusal of the county court to reconsider such proceedings, does not alter the case. *Gover, et al Lessee, v Cooley,* 7
3. There must be such a description of the land claimed in an action of ejectment, as will enable the sheriff to deliver possession after judgment. *Fenwick v Floyd's Lessee,* 172
4. A declaration in ejectment claiming 251 acres, part of a tract of land called, &c. without any description of the part claimed, and a writ of possession in conformity, are both defective. *Ib.*
5. In an action of ejectment by a purchaser under a sheriff's sale, against the debtor, who refused to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment, and the writ of *fieri facias*, and to prove the sale of the land, which may be done either by a deed from the sheriff, or a return of the *fieri facias*. They are sufficient to entitle him to recover. *Ib.*
6. —— In the absence of a deed from the sheriff, and his return to the *fieri facias*, a memorandum, in writing, of the sale, must be produced, to take the case out of the statute of frauds. *Ib.*
7. A sheriff's return to a *fieri facias*, which states a levy on "*part* of a tract of land called," &c. is void for uncertainty—cannot be set up by matter *de hors* the return, and a sale under it passes no title. But a levy on "*a tract* of land called," &c. under a *fieri facias* against a person who was seized of a part of such tract, and a sale under it, will pass his interest to the purchaser. *Thomas's Lessee v Turvey,* 435

*See* Witness 2.

ELECTION.

1. If one man takes another's money to do a thing, and he refuses to do it, it is a fraud; and it is at the *election* of the party injured, either to affirm the agreement, by bringing an action for the nonpayment of the money, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received. *Murphy v Barron,* 258

ENTICING.

*See* Slaves 1.

EQUITY.

*See* Court of Chancery.

ESCROW.

*See* Pleading 14, 15, 16, 17.

ESTATE FOR LIFE.

*See* Devise 2, 7, 8.

ESTATE TAIL.

1. By the act of 1782, *ch.* 23, the ancient mode of docking estates tail, by common recovery, was abolished, and any person seized of any estate tail in possession, remainder or reversion, may convey the same in the same manner and form that a tenant in fee may. *Newton, et al. v Griffith, et al.* 111

*See* Descents 1, 3, 4, 5, 6, 8.
—— Devise 2, 6, 9.

EVICTION.

1. Where the extent and limits of property leased are not exactly defined by the contract under which a tenant took possession, and in an action to recover the rent, the tenant relied upon an eviction of part of the demised premises by a third person claiming under his landlord, as a bar to its payment, the jury should look to all the facts in evidence, and from them determine the limits of the tenant's lease, and whether there was an eviction or not. *M'Elderry, et al. v Flannagan's Adm'r.* 308

EVIDENCE.

1. In ejectment the lessor of the plaintiff died pending the action, and his heirs at law were made parties in his place, without objection, and the cause continued several terms, and the plots were amended—*Held*, that it was not competent for the defendant to defeat the action by giving evidence that one of the heirs was an infant when she was made a party; and, that evidence that she was an infant at the time of the trial, would not entitle the defendant to a verdict against the other heirs who were of full age. *James et al. Lessee v Boyd*, 1
2. A receipt for the purchase money, in a deed for the conveyance of land, is only *prima facie* evidence of its payment. *Higdon, et ux. v Thomas*, 139
3. If one party gives in evidence a part of a conversation between the other party and the witness, it is competent for such other party to extract from the witness the whole of that conversation. *J. & P. Turner v Jenkins, et al.* 161
4. The return of a sheriff to a writ of *fi. fa.* showing a levy on part of a tract of land, without any description of such part, is defective, and a sale under it passes no title. *Fenwick v Floyd's Lessee*, 172
*Thomas's Lessee v Turvey*, 435
5. In an action of ejectment by a purchaser under a sheriff's sale, against the debtor, who refused to give up the possession of the land, it is incumbent on the plaintiff to produce in evidence the judgment, and the writ of *fi. fa.* and to prove the sale of the land, which may be done, either by a deed from the sheriff, or a return of the *fi. fa.* They are sufficient to entitle him to recover. *Fenwick v Floyd's Lessee*, 172
6. —— In the absence of a deed from the sheriff, and his return to the *fi. fa.* a memorandum, in writing, of the sale, must be produced, to take the case out of the statute of frauds. *Ib.*
7. Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration only. *Betts, et ux. v The Union Bank of Maryland*, 175
8. —— The greatest extent to which the authorities have gone, has been to allow an *additional* consideration to be proved, which is *not repugnant* to the one mentioned in the deed; but where a deed is impeached for fraud, the party to whom the fraud is imputed, will not be permitted to prove any other consideration in support of the deed. *Ib.*
9. A bill of sale of a sheriff for chattels levied on and sold by him, is improper testimony in itself, however it may be considered, accompanied by proof of the sheriff's authority to sell the property it professed to convey. *Sanderson's Ex'rs. v Marks*, 252
10. All the testimony offered by the plaintiff, who sued as executor, being rejected by the court as incompetent, and the defendant having given in evidence declarations of the testator, tending to prove the plaintiff's claim, it is a proper case for the jury to consider and decide, and the court have no right to instruct the jury that the plaintiff was not entitled to recover. *Ib.*
11. The jury alone are competent to decide on facts of which contradictory evidence may be offered. Before the court can legally give an instruction to the jury, on the prayer of one of the parties, they must

admit the truth of the testimony offered by the other, and that also offered by the party asking the instruction which may operate in his opponent's favour, and the existence of all material facts, reasonably deducible therefrom, even though contradicted in every particular by the testimony of him who seeks the instruction. Upon no other principle can the case be withdrawn from the consideration of the jury. *M'Elderry, et al. v Flannagan's Adm'r.* 308

12. It is a general rule of evidence, that in a suit brought by an incorporated bank, one who is a stockholder and interested in the event of the suit, is not a competent witness in behalf of the institution; but that rule is not without exception—as where an interested corporator is called upon to prove himself either to be or to have been the depositary of the muniments of his corporation *Union Bank of Maryland v Ridgely,* 324

13. An interested corporator, however, is not a competent witness to prove that a book continued to be one of the muniments of his corporation after he had ceased to be the depositary thereof. *Ib.*

14. The adoption of a code of by-laws by a corporation need not necessarily be by writing, but may be proved as well by the acts and uniform course of proceedings of such corporation, as by an entry or memorandum in writing. *Ib.*

15. Under an issue joined upon a plea of general *non est factum*, the defendant may give in evidence any thing which goes to show the instrument of writing was originally void at common law—as lunacy, fraud, coverture, &c. or that it had become void subsequent to its execution—as by erasure, alterations, &c. for that plea puts in issue, as well its continuance as a deed, as its execution. *Ib.*

16. The defendant may give in evidence, under the plea of general *non est factum*, that the instrument of writing was delivered as an *escrow*, on a condition not performed. *Ib.*

17. Where the delivery of a deed as an *escrow* is pleaded, the issue is upon that special matter, and the proof rests upon the defendant; and if there be no proof on the part of the defendant, the possession of the instrument by the plaintiff, is *prima facie* evidence of the delivery as a deed, and is sufficient to sustain the issue on his part. *Ib.*

18. The acts of corporations may now be evidenced by writing without seal. *Ib.*

19. The assent and acts of corporations, like those of individuals, not reduced to writing, may be inferred from other facts and circumstances, without a violation of any known rule of evidence. *Ib.*

20. Where the pleadings in a cause put in issue the facts that certain false and deceptious entries were made in the books of a banking corporation by its clerks, with the connivance of the cashier, on proof that such books were kept by the clerks of the bank, and such entries were in their handwriting, the books are evidence to show what entries were in them, which can only be done by their production, and are proper to lay a foundation for other testimony to show fraud, malconduct, neglect, or violation of duty by the cashier. *Ib.*

21. As a general rule, a person who has neither been examined upon, nor attended a survey of lands made by order of court, is not a competent witness to give evidence at the trial of the cause in relation to the locations of the lands made upon the plots. *Wall v Forbes,* 441

22. In proving the relative prices of different qualities of flour at Z, in 1817, other testimony is admissible than direct positive proof from a witness who knew the value at that place. In the absence of such positive proof the jury may infer the value, from proof of the price of each kind of flour in 1817, at other places in the neighbourhood of Z, and at N, a port to which flour was commonly sent from Z, for inspection and sale; and this latter species of evidence, which is admissible for the above purpose, is not secondary, though of a less conclusive character than direct proof. *Williamson v Dillon,* 444

23. Where it was doubtful, from the manner in which a bill of exceptions was drawn whether the whole testimony of a witness was hearsay, part of it being unquestionably so, the appellate court made a comparison of the several parts of

the testimony, and determined the whole to be hearsay, and therefore incompetent. *Ib.*

24. Information received by one partner (the witness) from his copartner, of the price of merchandize purchased by him at Z, for which the witness knew that his house at B, where he resided, paid at the price mentioned, is but hearsay evidence of the price of such merchandize at Z. *Ib.*

25. Where a witness declared "that he was called on in the spring of the year 1817, to state the difference usually allowed on the sale of flour between fine, superfine, &c. that he *then* stated the difference was as follows," &c.—*Held*, that this might be true, and yet the witness have no knowledge of the facts—his declaration being, that he made the statement, and not that it was true. Such testimony is not admissible evidence. *Ib.*

*See* Answer in Chancery 1, 2, 3, 4.
—— Assets 2.
—— Attachment 1.
—— Bill of Exchange 1, 2, 3, 4.
—— Judgment 2, 3.
—— Law & Facts 4.
—— Limitation of Actions.
—— Marriage.
—— Procedendo 1.

## EXCEPTIONS.

1. The report of the auditor may be excepted to in the appellate court, and the whole accounts gone into, whether general or special exceptions, or no exceptions, had been taken in the court of chancery—Per *Buchanan*, Ch. J. *S. & T. Ringgold v M. Ringgold, et al.* 67

## EXECUTION.

*See* Fieri Facias.

## EXECUTORS & ADMINISTRATORS.

1. An executor empowered to sell lands by last will, having sold them in 1814, and put the purchaser in possession, it was his duty, if the sale was for *cash*, payment being refused, to have sued; if on *credit*, he ought, within a reasonable time, to have obtained bond and security for the purchase money; and at all events should have retained possession of the land until the necessary security was given. Omitting to sue at law until 1819, he was *prima facie* guilty of gross negligence, and responsible, as a trustee would be, for the proceeds of the lands from the time of the sale, deducting his reasonable expenses and commissions. *Hurtt v Fisher*, 88

2. Where a declaration in *assumpsit* sets forth a claim or demand of the plaintiff against the intestate of the defendant, and the intestate's promise to pay it—a reference of such demand by his administrator, (the defendant,) and the plaintiff, to arbitrators—an award, in pursuance of such reference, for a specific sum in favour of the plaintiff—a promise by the defendant, as administrator, to pay it, and charges a breach in the nonpayment of that sum, it contains matter enough, in an action against the defendant in his own right, to warrant a judgment against him in his character of administrator. The plaintiff is under no necessity to aver assets in the hands of the defendant, as administrator, sufficient to pay his debt. *Giles Adm'r. of Bacon v Perryman*, 164

3. —— This peculiar mode of declaring originated in a plan to prevent the act of limitations from barring, and proceeds upon the ground, that it neither pledges the personal responsibility of the administrator after verdict, nor deprives him of any defence he could have had, if he had been charged with an *assumpsit* by his intestate; and with these qualifications, it will be received and adopted. *Ib.*

4. No form of words is necessary to be used in an averment that the defendant is administrator. If enough is said so as to amount to an allegation, that the defendant administered on the estate of the deceased, it will suffice. *Ib.*

5. An administrator who relies on the general issue plea, after verdict, and judgment thereon, has admitted assets to pay the claim against him. *Ib.*

*See* Declaration 1.
—— Distributee & Distribution 1.
—— Orphans Court 1.
—— Verdict 1.

## F

## FACTS.

*See* Law & Facts.

FEE SIMPLE.
*See* Descents 1, 3, 4, 5.
—— Devise 2, 9.

FEME COVERT.
1. By the common law a *feme covert*, being an alien, is not entitled to be endowed, nor to inherit. *Buchanan v Deshon, et al.* 280
2. The act of 1813, *ch.* 100, does not authorise the endowment of a female alien, who during her coverture never resided in the *United States.* *Ib.*
*See* Husband & Wife.

FIERI FACIAS.
1. The return of a sheriff to a writ of *fi. fa.* showing a levy on part of a tract of land, without any description of such part, is defective, and a sale under it passes no title. *Fenwick v Floyd's Lessee,* 172
*Thomas's Lessee v Turvey,* 435
2. Joint property in the possession of one of the owners, may be seized and sold under a *fieri facias* against him only; and the purchaser's right will be complete to the extent of the interest of him against whom the execution issued, and he may hold accordingly. *M'Elderry, et al. v Flannagan,* 308
3. Where F, a ship-carpenter, contracted with C to build a vessel for him, which C was to pay for as the work advanced, and furnish all the materials and labour, except what appertained to the ship-carpenter's work, the vessel being in the possession of F, not entirely paid for, and nearly finished—*Held*, that F had an interest in the vessel to the extent of the carpenter's work *not paid for*, liable to seizure and sale on process for the recovery of debts. *Ib.*
4. A sheriff's return to a *fieri facias*, which states a levy on "part of a tract of land called," &c. is void for uncertainty—cannot be set up by matter *de hors* the return, and a sale under it passes no title. *Thomas's Lessee v Turvey,* 435
5. —— But a levy on "a tract of land called," &c. under a *fieri facias* against a person who was seized of a part of such tract, and a sale under it, will pass his interest to the purchaser. *Ib.*
*See* Ejectment 3, 4.
—— Evidence 5, 6.

FOREIGN ATTACHMENT.
*See* Attachment.

FOREIGN JUDGMENT.
*See* Judgment 2, 3.

FRAUD.
1. If one man takes another's money to do a thing, and he refuses to do it, it is a fraud; and it is at the *election* of the party injured, either to affirm the agreement by bringing an action for the nonpayment of the money, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use. *Murphey v Barron,* 258
*See* Consideration 2.

FRAUDS, (STATUTE OF)
*See* Statute of Frauds.

G

GARNISHEE.
*See* Attachment.

GENERAL REPUTATION.
*See* Reputation.

GIFT.
1. If a father, as natural guardian of his child, was in possession of a slave at the time of a gift of the slave by the owner to the child, it was such a possession as was required by the act of 1763, *ch.* 13, *s.* 3, to make it a valid gift, and passed the property without any further delay by the donor. *Sanderson's Ex'rs v Marks,* 252

GRACE.
*See* Days of Grace.

GRANT.
*See* Name 1.

GRANDCHILDREN.
*See* Distributee & Distribution.

GUARDIAN.
*See* Court of Chancery 16, 17.
—— Natural Guardian.

H

HEARSAY EVIDENCE.
*See* Evidence 22, 23, 24, 25.

HEIRS.
*See* Descents 1, 2, 4.

*See* Ejectment 1.
—— Evidence 1.

HUSBAND AND WIFE.

1. A wife being entitled to the proceeds of lands devised to be sold, dying after a sale of them, her husband surviving is entitled to the proceeds thereof. *Hurtt v Fisher*, 88
2. The consideration of an agreement being for the sale of the wife's land, in the absence of an express promise, the law will raise one to the husband and wife, on which the husband may sue either in his own name, or in the names of himself and wife; and in such case, even if there was an express promise to the husband, the wife might be joined as plaintiff. *Higdon, et ux. v Thomas*, 139
3. But a *feme covert* cannot be joined in an action to recover the price of property sold by her, and which belonged to her before coverture, or for the value of services by her personally rendered, unless there be an express promise of payment to her. The distinction arises from rights which pass to the husband absolutely, and those which survive to the wife, and over which he has no power of transfer but by the consent and co-operation of the wife. *Ib.*
4. The lands of an intestate, being incapable of a beneficial division, on the petition of his heirs, and by the order of the court of chancery, were sold, and the sale ratified. After this ratification, and as to part of the proceeds prior to any order or decree adjudging who was entitled thereto, one of the heirs, a married woman, died. Her husband, who survived her, and who was a party to the petition, also died—*Held*, that the husband's representatives were not entitled to the wife's portion of that part of the proceeds of her father's estate, respecting which no order or decree of distribution had been passed at the time of the husband's death, but that it belonged to her personal representatives. *Leadenham's Ex'r. v Nicholson, et al.* 267
5. The representatives of a husband who survived his wife, are entitled to the *choses in action* of the wife, where the husband had either reduced them into possession, or obtained judgment for them at law or in equity, either in his own favour or of himself and wife. *Ib.*
6. An agreement between a man and his intended wife, in consideration of marriage, (which had none of the legal attributes of a marriage settlement, so as to overreach the claims of creditors,) to secure to her, for her own use, an annuity for life, may, after the marriage, and the death of the husband, be enforced by the wife against his representatives; and his estate being insufficient to pay his debts, she will be treated as a general creditor to the extent of her claims under the agreement, and her dividend so invested as to produce as much of the annuity as practicable. But where the widow having claimed payment only of her annuity from the time of the death of her husband, her dividend was estimated upon its arrearages, from that time to the sale of his estate, and the interest which had accrued thereon. *Buchanan v Deshon, et al.* 280
7. —— Under the above agreement, the children of the marriage, succeeding to the rights of the wife, the dividend of the estate of the husband, invested for the benefit of the mother, will, after her death, be divided equally among the children, and their proper representatives. *Ib.*

*See* Bill of Exchange 2, 4.

I J

IMPLIED ASSUMPSIT.

*See* Agreement 1.
—— Assumpsit 3.
—— Husband and Wife 2.

INCOMPETENT EVIDENCE & WITNESS.

*See* Evidence 12, 13, 21, 23, 25.
—— Witness.

INFANT.

*See* Court of Chancery 16.
—— Ejectment 1.

INSOLVENT DEBTOR.

1. The assets of insolvents are distributable according to equity. *M'Culloh v Dashiell's Adm'r.* 96

*See* Appeal 5.

INSURANCE.

1. The strictness and nicety which have been wisely adopted in the trial of questions arising on policies of marine insurance, are not, to their full extent, applicable to the policies of fire insurance associations, formed for the individual accommodation and security of its members—the risk being assumed on the knowledge acquired by an actual examination made by the officers of the company, and not on the representations coming from the assured. *Jolly's Adm'rs. v Baltimore Equitable Society, &c.* 295
2. —— Such an association cannot be viewed as involving in it a mutual relinquishment of the right of exercising those ordinary necessary acts of ownership over their houses, which have been usually exercised by the owners of such property; and, consequently, the insured is authorised to make any necessary repairs in the mode commonly pursued on such occasions. But if by gross negligence or misconduct of the workmen employed, a loss by fire ensue; or if alterations be made in the subject insured materially enhancing the risk, and not necessary to the enjoyment of the premises insured; or which, according to usage and custom, were not the result of the exercise of such ordinary acts of ownership, as in the understanding of the parties were conceded to the insured at the time of the insurance, and a loss by fire is thereby produced, then are the underwriters released from all liability to indemnify for such loss. *Ib.*
3. —— In the absence of any contract, or established rule of law, determining what repairs or alterations the insured was authorised to make; or whether, if authorised, they were made in the usual way, the jury is the proper tribunal to decide those questions. *Ib.*
4. Alterations and additions to houses insured against fire, do not *per se*, change the risk; they remain subject to the same perils, although their degree may be increased or diminished; and the jury is the proper tribunal to decide whether the risk has been increased. *Ib.*

INTEREST.

*See* Cause of Action 1.

*See* Trust & Trustees 9, 10, 11, 12, 13, 14.

INTESTATE.

1. A dying intestate, means a dying without making a valid and operative disposition by will. *Newton, et al.* v *Griffith, et al.* 111
2. In the distribution of the personal estate of an intestate, who died leaving no descendants, but leaving a brother, and the children and grandchildren of a deceased sister and brother, it was held, that the grandchildren, (being the children of a son or daughter of the deceased sister or brother of the intestate who died before him,) were not entitled to any portion of the estate. *Duvall, et ux.* v *Harwood's Adm'rs.* 474
3. —— The share of a brother who survived the intestate, but who died before the distribution of the intestate's estate, is payable to the executor or administrator of such brother. *Ib.*

JOINT & SEPARATE CREDITORS.

1. C & T drew a bill in favour of M, on D & B, partners in trade, which they accepted. M sued D & B at law on their acceptance, and pending the suit D died. Judgment was had against B, and he being insolvent obtained a discharge under the insolvent laws. P administered on D's estate, and received assets from his separate property to a large amount, though insufficient to pay D's individual debts, and also received some of the partnership funds. The judgment not being paid, and the partnership funds being insufficient to pay its debts, M filed a bill in equity against D's administrator, claiming to be paid out of the separate assets, an equal proportion with D's separate creditors.—*Held*, that he was not entitled to recover. *M'Culloh v Dashiell's Adm'r.* 96
2. Joint creditors, in equity, can only look to the surplus of the separate estate, after the payment of the separate debts. *Ib.*
3. Separate creditors, in equity, can only seek indemnity from the surplus of the joint fund, after the satisfaction of the joint creditors. *Ib.*

4. Where the claims of joint creditors do not come into conflict with those of the separate creditors, but only with the interests of the representatives of the deceased partner, equity will decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several. *Ib.*
5. At law the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, without restriction from a court of equity; yet when by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, that court will give to the separate creditors all the advantages thus by accident thrown upon them. *Ib.*

JOINT & SEPARATE DEBTS & DEBTORS.
*See* Fieri Facias 2.
—— Joint & Separate Creditors.

JOINT & SEPARATE ESTATE.
*See* Joint & Separate Creditors.

JOINT OWNER.
*See* Fieri Facias 2.
—— Partners & Partnership 2.
—— Replevin 3.

ISSUE.
*See* Devise 2, 3, 4, 5, 6.

ISSUES.
*See* Pleading.

JUDGMENT.
1. In an action on a promissory note, drawn in favour of C & R, and endorsed by R in their names, to P, the writ was against R *as surviving partner of C*, but the declaration was not. It was proved that C died before the making of the note. Judgment was rendered against R without stating as surviving partner. On appeal—judgment affirmed. *Raborg v Bank of Columbia*, 231
2. Foreign judgments are not conclusive when sought to be enforced by suits being brought upon them —they are then but *prima facie* evidence—may be impeached for irregularity, and rebutted by evidence. *Taylor & M'Neal v Phelps*, 492
3. The judgments of foreign courts of competent jurisdiction, when they come incidentally in question —as where they are relied upon by garnishees as a protection against the claims of their former creditors, have the force and effect of domestic judgments, and are conclusive. *Ib.*
*See* Attachment 1, 2.
—— Executors & Administrators 2.

JURISDICTION.
*See* Court of Chancery 18.

JURY.
*See* Law & Facts.

L.

LAND.
1. The proceeds of land devised to be sold, are thereby turned into money, and considered in equity as personal estate. *Hurtt v Fisher*, 88
2. In equity money directed to be laid out in land, will before investment, be considered as land; and land directed to be sold and converted into money, will, before a sale, be considered as money, and pass as such. *Leadenham's Ex'r. v Nicholson, et al.* 267
*See* Name 1.

LANDLORD & TENANT.
1. Where a landlord having leased property to one tenant, subsequently leased a part of the same property to another, the first is under no obligation to resist the second by force in taking possession; and notice by the first to the second tenant, (after a distress levied by the landlord on the former,) that he should consider him his tenant, is nugatory and inoperative. *M'Elderry, et al. v Flanagan*, 303
2. Where F, a ship-carpenter, contracted with C to build him a vessel, for which C was to pay as the work advanced, and furnish all the materials and labour except what appertained to the ship-carpenter's work, the vessel being in the possession of F, not entirely paid for, and nearly finished, was levied on by the landlord of the ship-yard as a distress for rent—*Held*, that F had an interest in the vessel to the extent of his carpenter's work *not then paid for*, liable to seizure and

sale on process for the recovery of debts, or rent due by him. *Ib.*
*See* Eviction 1.

LAW & FACTS.

1. Where a plaintiff offers no testimony to the jury, or such as is so slight and inconclusive that a rational mind cannot draw the conclusions sought to be deduced from it, it is the right of the court, and their duty, when applied to for that purpose, to instruct the jury, that the plaintiff is not entitled to recover. *Morris v Brickley & Caldwell,* 107
2. A positive and absolute direction to the jury will not be granted, if it obliges the court to discredit a witness; to do that the intervention of a jury is peculiarly necessary. *Ib.*
3. The jury alone are competent to decide on facts of which contradictory evidence may be offered. Before the court can legally give an instruction to the jury, on the prayer of one of the parties, they must admit the truth of the testimony offered by the other, and that also offered by the party asking the instruction which may operate in his opponent's favour, and the existence of all material facts, reasonably deducible therefrom, even though contradicted in every particular by the testimony of him who seeks the instruction. Upon no other principle can the case be withdrawn from the consideration of the jury. *M'Elderry, et al. v Flannagan's Adm'r.* 308
4. Whether or not the drawer of a bill of exchange had reasonable grounds to expect that his bill would be honoured, (that facts upon which that question arises being admitted or undeniable,) is exclusively a matter of law to be pronounced by the court; but if the facts be controverted, or the proof be equivocal, or contradictory, then it becomes a mixed question, both of law and fact, in which case, the court hypothetically instruct the jury as to the law, to be pronounced accordingly as they may find the facts. *Cathell v Goodwin,* 468

*See* Evidence 10.
—— Insurance 3, 4.
—— Limitation of Actions 13.

LEGACY & LEGATEE.

1. A legacy of a less amount than the sum due to the legatee, is not considered in law a satisfaction of a pecuniary debt. *Owings's Ex'rs. v Owings,* 484

LETTERS OF ADMINISTRATION & TESTAMENTARY.

*See* Orphans Court 1.
—— Profert 1.

LETTERS ROGATORY.

*See* Commission & Commissioners 2.

LIEN.

1. Where F, a ship-carpenter, contracted with C to build a vessel for him, for which C was to pay as the work advanced, and furnish all the materials and labour, except what appertained to the ship-carpenter's work, the vessel being in the possession of F, not entirely paid for, and nearly finished, was levied on by the landlord of the ship-yard as a distress for rent—*Held,* that F had an interest in the vessel to the extent of his carpenter's work *not paid for,* liable to seizure and sale on process for the recovery of debts, or rent due by him. *M'Elderry, et al. v Flannagan,* 308

LIFE ESTATE.

*See* Estate for Life.

LIMITATION OF ACTIONS.

1. The act of limitations, (1715, *ch.* 23,) does not extinguish the debt, but only bars the remedy. An acknowledgment of a debt, or a promise to pay it, by the defendant, within the time prescribed, is sufficient to revive the action. *Oliver v Gray,* 204
2. —— *Held,* 1. That the suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only restores the remedy. *Ib.*
3. As to what promises or acknowledgments will take a case out of the act of limitations—*Held,* 2. That the promise need not be absolute, but a conditional promise is sufficient; and in such case it is incumbent on the plaintiff to show at the trial, either a performance of the condition, or a readiness to perform it. *Ib.*
4. —— *Held,* 3. That the acknowledgment must be of a present sub-

sisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt a defendant from a moral obligation to pay. *Ib.*

3. —— *Held*, 4. That such an acknowledgment, accompanied with a naked refusal to pay, or a refusal and an excuse for not paying, which in itself implied an admission that the debt remained due, and furnished no real objection to the payment of it, is sufficient. *Ib.*

6. —— *Held*, 5. That an unqualified acknowledgment, &c. with no other excuse for not paying than a reliance on the bar created by the act of limitations is sufficient to take the case out of the act. *Ib.*

7. —— *Held*, 6. That the acknowledgment may be in whole or in part. *Ib.*

8. —— *Held*, 7. That it is sufficient if it be after bringing the suit. *Ib.*

9. —— *Held*, 8. An admission that the sum claimed has not been paid, is not sufficient to take a case out of the act of limitations, without some further admission, or other proof that the debt once existed. *Ib.*

10 —— *Held*, 9. The acknowledgment need not be made to the plaintiff himself, but may be made to anybody else. *Ib.*

11. —— *Held*, 10. It is for the court to decide what kind of promise or acknowledgment is sufficient to take a case out of the act of limitations, and the evidence, offered to prove such promise or acknowledgment, is proper to be submitted to the jury, as in other cases, under the direction of the court. *Ib.*

12. Every acknowledgment which is offered to take a case out of the act of limitations, must be taken all together; and no evidence can be received, to turn a denial of the existence of a debt into an acknowledgment of a subsisting liability, by proving that the party making the admission was mistaken in supposing the debt to have been paid. *Ib.*

13. Where the plaintiff chooses to introduce the defendant's declarations, he must be content to take them as they are, and cannot be permitted to disprove them by other evidence. *Ib.*

14. A receipt for a sum of money, whereby the person receiving it undertook to return the sum borrowed "when called on to do so," creates a cause of action from its date, bearing interest, and against which the act of limitations begins to run, from that time. *Darnall's Ex'rs. v Magruder*, 469

15. In an action on a promissory note payable four months after date, the defendant pleaded *non assumpsit infra tres annos*, to which the plaintiff replied, that he at the time of making the promise, was beyond seas and without the jurisdiction of the court, and so remained and continued, &c. and the defendant demurred—judgment was rendered for the plaintiff, as that mode of pleading the act of limitations in this case was defective. *Murdock v Winter's Adm'r* 471

16. The act of limitations begins to operate as a bar from the time the cause of action arises, and not from the time of making the promise. *Ib.*

LIMITATION OF ESTATE.

*See* Devise 2, 3, 4, 5, 6, 7, 8.

M

MARRIAGE.

1. Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be made for a money consideration. *Betts, et ux. v The Union Bank of Maryland*, 175

2. Ante-nuptial settlements, made in consideration of marriage, are good, even though the party be then indebted. *Ib.*

*See* Husband & Wife.

MEASURE OF DAMAGE.

*See* Contract 3, 4, 5.

MECHANICS.

*See* Lien 1.

MESNE PROFITS.

*See* Court of Chancery 17, 18.

MINORS.

*See* Infant.

MIXTURE OF PROPERTY.

1. In the case of a mixture of property, from necessity the full value is given to the innocent party *S. & T. Ringgold v M. Ringgold, et al.* 11

MONEY.

*See* Land 1, 2.

MONEY HAD & RECEIVED.
1. The action for money had and received, is an equitable action, and equally as remedial in its effects as a bill in equity. *Murphy v Barron*, 258
2. If one man takes another's money to do a thing, and he refuses to do it, it is a fraud; and it is at the *election* of the party injured, either to affirm the agreement, by bringing an action for the nonpayment of the money, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use. *Ib.*
3. —— But where a vendor was exonerated from the delivery of a slave, then out of his possession, whom he had sold, and been paid for, and afterwards persuaded or enticed to abscond, so that the purchaser never got possession of him, no action can be maintained upon the contract of sale for a nondelivery, or to recover back the purchase money, as money had and received by him to the use of the vendee. Either could have been maintained, if it had been the vendor's duty to deliver the slave, and he had refused. The proper remedy here is a special action on the case for persuading or enticing the slave to abscond. *Ib.*

N

NAME.
1. A tract of land may acquire, by reputation, a name different from that which it bears in the patent, and may pass by such acquired name. *Wall v Forbes*, 441

NATURAL GUARDIAN.
*See* Gift 1.

NEGLIGENCE.
*See* Trust & Trustee 7, 12, 17, 18, 19.

NEGROES & SLAVES.
*See* Slaves.

NEW PARTIES.
*See* Ejectment 1.

NON EST FACTUM.
*See* Pleading 4, 5, 8, 10, 11, 12, 14.

NOTICE.
*See* Bill of Exchange 1, 4.
*See* Landlord & Tenant 1.
—— Usage.

O

OFFICE FOUND.
*See* Alien.

ORPHANS COURT.
1. The orphans court, at July term, 1824, on the petition of J S, ordered the register to grant him letters of administration on the estate of R S, on his giving bond, with security. On the 13th of September 1824, in the recess of the court, letters were accordingly granted. On the 14th of the same month and year, still in the recess of the court, W S, the only surviving brother of the deceased, by his petition, objected to letters so granted, excepted to such appointment, and prayed an appeal, which was granted by the court on the 13th of October 1824. The court of appeals dismissed the appeal. *Sewell v Sewell's Adm'r. D. B. N.* 9
2. By the act of 1818, *ch.* 204, appeals from the orders and decisions of the orphans courts, must be made within thirty days after such order or decision. *Ib.*

P

PAROL EVIDENCE.
*See* Corporation 3.
—— Evidence.

PARTIES.
*See* Appeal 6.
—— Court of Chancery 21.
—— Ejectment 1.

PARTNERS & PARTNERSHIP.
1. C & T drew a bill in favour of M, on D & B, partners in trade, which they accepted. M sued D & B at law on their acceptance, and pending the suit D died. Judgment was had against B, and he being insolvent obtained a discharge under the insolvent laws. P administered on D's estate, and received assets from his separate property to a large amount, though insufficient to pay D's individual debts; he also received some of the partnership funds. The judgment not being paid, and the partnership funds being insufficient to pay its debts, M filed a bill *in* equity a-

gainst D's administrator, claiming to be paid out of the separate assets, an equal proportion with D's separate creditors—*Held*, that he was entitled to recover. *M'Culloh v Dashiell's Adm'r.* 96

2. Where one part-owner sells, as his own, the property of his firm, all the partners may sue. *Higdon, et ux. v Thomas*, 153

*See* Court of Chancery 10, 11, 12, 13.
—— Fieri Facias 2.
—— Joint and Separate Creditors 2, 3, 4, 5.

PARTNERSHIP FUNDS.
*See* Joint and Separate Creditors.
—— Partners and Partnership.

PERSONAL ESTATE.
*See* Lands 1.

PHYSICIAN.
*See* Assumpsit 2.

PLEADING.

1. A writ of *scire facias* against *special bail*, which does not recite the issue and return of a *ca. sa.* against the principal, is sufficient upon issue joined on the plea of *nul tiel record*. *Cappeau's Bail, v Middleton & Baker*, 154

2. —— To such writ, the bail having pleaded the death of his principal before any *ca. sa.* returned, the plaintiff, in his replication, traversed that fact, and tendered an issue to the country. Its conclusion was technically right. An issue joined on such pleadings, is not an immaterial one—the whole matter in controversy being decided by it. *Ib.*

3. The omission of the plaintiff in his replication to set out the *ca. sa.* and return, in proceedings against bail, is mere informality in pleading—bad only on demurrer, but cured by verdict. *Ib.*

4. A plea of special *non est factum* is a general issue plea, and like other general issue pleas need not be pleaded before the rule day, but may be received when the cause is called up for trial. *Union Bank of Maryland v Ridgely*, 324

5. Whatever apparent inconsistency there may be between the pleas of general performance and *non est factum*, it is the settled practice under the statute, 4 *Jan, ch.* 16, to receive them; for defendants are not confined to pleas strictly consistent. *Ib.*

6. The only pleas now disallowed, on the mere ground of inconsistency, are the general issue, and tender; and the reason is, that one goes to deny the existence of any, while the other admits some cause of action. *Ib.*

7. Where the plaintiffs in their replication set out a code of by-laws of their corporation, which prescribe the duties of an officer of the corporation, and then assigns as a breach, a violation of duties so prescribed, on which breach issue is tendered by the defendant, and joined by the plaintiffs, such by-laws are virtually admitted by the defendant in his pleadings *Ib.*

8. It is a general principle of pleading, that where a plea produces a direct affirmative and negative by denying the allegation in the declaration, it should conclude to the country, whether the affirmative of the issue is held by the plaintiff or defendant; and that the proof of the affirmative rests on him who asserts it. *Ib.*

9. When new matter is introduced on either side, the pleading ought to conclude with a verification. *Ib.*

10. —— In the application of the above rules, the plea of general *non est factum* in an action of debt on a bond, which by denying the allegation in the declaration that it is the writing obligatory of the defendant, makes the issue between the parties—concludes to the country, and throws the whole proof of the execution of the bond, including the delivery, upon the plaintiff, who in that case asserts the affirmative. *Ib.*

11. Under an issue joined upon a plea of general *non est factum*, the defendant may give in evidence any thing which goes to show that the instrument of writing was originally void at common law—as lunacy, fraud, coverture, &c. or that it had become void subsequent to its execution—as by erasure, alterations, &c. for that plea puts in issue, as well its continuance as a deed, as its execution. *Ib.*

12. A defendant may plead specially any matter which he might give in evidence under the plea of general *non est factum*; but if he chooses

to do so, being new matter, he must do it with a verification; and holding the affirmative, he draws the burthen of proof upon himself. *Ib.*

13. If a defendant seeks to avoid a bond by duress, infancy, usury, &c. which cannot be given in evidence under the general issue, (the bond not being therefore void, but voidable,) he must plead such new special matter with a verification; and the proof lies upon him. In every such case the issue is upon the matter specially alleged in the plea. *Ib.*

14. The defendant may give in evidence, under the plea of general *non est factum*, that the instrument of writing was delivered as an *escrow*, on a condition not performed; and it is settled he may plead it specially, and that the proper conclusion to that plea is to the country; because it is a *special negative* to the affirmative in the declaration—the allegation in the declaration that it is the writing obligatory of the defendant, including the allegation of the delivery of it as a deed; and it is this conclusion to the country, that raises the question, whether the proof is on the plaintiff or defendant. *Ib.*

15. Where the delivery of a deed as an *escrow* is pleaded, the issue is upon that special matter, which being alleged and relied upon by the defendant to show that it is not his deed, the proof of that allegation rests upon him; and if there be no proof on the part of the defendant, the possession of the instrument by the plaintiff, is *prima facie* evidence of the delivery as a deed, and is sufficient to sustain the issue on his part, *Ib.*

16. If the delivery as an *escrow* be proved on the part of the defendant, as alleged in the plea, the proof of the performance of the condition lies upon the plaintiff where the affirmative is with him. *Ib.*

17. And where the defendant pleaded that he signed the supposed writing obligatory at the request of the principal obligor, and as his surety, and returned it to him, to be by him submitted to the obligees, (a corporation,) for their approbation and acceptance; and if it should be approved and accepted by them, that then it was to be considered and delivered as the act and deed of the defendant; and that it never was approved by the obligees by any act in their corporate capacity, and so it was not his deed—*Held*, that in the absence of all evidence on the part of the defendant, the possession and production of the instrument of writing by the obligees would be sufficient *prima facie* evidence of the delivery and acceptance, to entitle them to a verdict on the issue joined on such a plea. *Ib.*

18. The day laid in pleadings is frequently not material—as in trespass, where the injury charged may be proved to have been committed on a day before or after the time stated in the declaration; provided it appears to have been before the action was brought. *Ib.*

19. In assigning the breaches of the condition of a bond, which was taken and intended as a security for a limited period, the time of the commission of the breach, is so far material that it must be laid to be within such period; and an allegation of a breach beyond that period, renders the whole assignment defective, and bad on demurrer—as it then appears on the record that the defendant is charged beyond his legal responsibility. *Ib.*

20. It is an established rule in pleading, that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in substance—as if a plea be bad, the defendant may avail himself of any substantial defect in the declaration, or if the replication be bad, the plaintiff may avail himself of any defect in the plea. *Murdock v Winter's Adm'r.* 471

21. So where in an action on a promissory note payable four months after date, the defendant pleaded *non assumpsit infra tres annos*, to which the plaintiff replied, that he at the time of making the promise, was beyond seas, &c. and the defendant demurred—Judgment was rendered for the plaintiff, as that mode of pleading the act of limitations in this case is defective. *Murdock v Winter's Adm'r.* 471

*See* Declaration

—— Procedendo 1.

POLICY OF THE LAW.
*See* Administration 1.

POSSESSION.
*See* Gift 1.

PRACTICE.
1. Where a record had not been transmitted to the appellate court under a writ of error, that court will lay a rule on the plaintiff in error, and clerk of the court to which the writ was directed, to show cause, &c. On the record being filed, the court will, if it be the regular term for judgment in case the record had been duly transmitted, and no counsel appearing for the plaintiff in error, dismiss the writ of error. *Bourne v Mackall*, 86
2. A plea of special *non est factum* is a general issue plea, and like other general issue pleas need not be pleaded before the rule day, but may be received when the cause is called up for trial. *Union Bank of Maryland v Ridgely*, 324
3. Whatever apparent inconsistency there may be between the pleas of general performance and *non est factum*, it is the settled practice under the statute of 4 *Ann*, *ch.* 16, to receive them; for defendants are not confined to pleas strictly consistent. *Ib.*
4. The only pleas now disallowed, on the same ground of inconsistency, are the general issue, and tender; and the reason is, that one goes to deny the existence of any, while the other admits some cause of action. *Ib.*
5. When an amendment of the pleadings is made at the trial under the act of 1809, *ch.* 153, *s.* 1, time is to be given during the term, to the adverse party to prepare to support his case; yet the cause is not, therefore, to be continued, unless the court shall be satisfied that a continuance is necessary. *Ib.*
*See* Court of Appeals 3, 4.
—— Court of Chancery 18.

PREFERENCE.
*See* Joint and Separate Creditors.

PRESUMPTION.
*See* Attachment 2.

PRIMA FACIE EVIDENCE.
*See* Evidence 2.
—— Judgment 2.

PRINCIPAL & AGENT.
1. The owners of merchandize, or other property, may sue in their own names on contracts of sale made by their agents, to whom express promises to pay have been made, and with whom the vendees dealt as sole owners of the property, having no knowledge of their principal. *Higdon, et ux. v Thomas*, 153

PRINCIPAL & SURETY.
*See* Corporation.

PRIORITY.
*See* Joint and Separate Creditors.

PROCEDENDO.
1. Where the pleadings on the part of the plaintiff were defective, but the evidence stated in the bill of exceptions showed the plaintiff had some claim, and the verdict and judgment were for him, the appellate court, on reversing the judgment, awarded a *procedendo*. *J. & P. Turner v Jenkins, et al.* 161

PROFERT.
1. An omission to make *profert* of letters of administration, cannot be taken advantage of after verdict. *See* DECLARATION 1, and *Vandersmith v Washmein's Adm'r.* 4

PROMISE.
*See* Assumpsit 7, 8, 9.
—— Limitation of Actions.

PROMISSORY NOTE.
1. W drew a promissory note, which did not bear date at any particular place, but was made negotiable at the bank of the plaintiffs; it was in favour of C R & Son, or order, and by C R, the defendant, in their names, specially endorsed to the plaintiffs, whose bank was at *George-Town*, in the District of *Columbia*. The note not being paid at maturity, it was on the day after the third day of grace, presented for payment to an agent of W at the said bank, appointed for the purpose of attending to the payment or renewal of W's notes held by the plaintiffs, which being refused, notice of its dishonour was put into the post office at *George-Town*, directed to C R (the defendant,) at *Baltimore*, in the state of *Maryland*, where he resided. W,

when the note became due, resided in *Prince-George's* county, in *Maryland*. It appeared that it was the custom of all the banks and merchants in the District of *Columbia* to demand payment of notes on the fourth day after they became due—*Held*, that the defendant was liable on his endorsement to the plaintiffs. *Raborg v Bank of Columbia*, 231

2. In an action on a promissory note, drawn in favour of C & R, and endorsed by R in their names, to P, the writ was against R *as surviving partner of C*, but the declaration was not. It was proved that C died before the making of the note. Judgment was rendered against R, without stating as surviving partner. On appeal—Judgment affirmed. *Ib.*

3. A drew a promissory note dated at *George-Town*, in the District of *Columbia*, and there payable 60 days after date, in favour of B, or order, who endorsed it to the plaintiffs, by whom it was discounted. On the first day, after the third day of grace, payment was demanded of this note of A, who not paying it, notice of its dishonour was sent by post to *Baltimore*, in *Maryland*, to B, who did not then, nor when he endorsed the note, reside at *George-Town*, in the District of *Columbia*. It appeared that it had been the universal practice of banks and merchants in the District of *Columbia*, for 20 years, to present negotiable notes due and unpaid, to the drawer for the payment, on the fourth day of grace; that such usage was of public notoriety, and that the demand and notice abovementioned, were in conformity thereto—*Held*, that B's contract was to be considered as made in reference to this usage; that both he and the drawer looked to the place where the money was to be paid, and the contract performed, and must be presumed to have known this usage, and he was, therefore, liable as endorser. *The Bank of Columbia v Fitzhugh*, 239

4. A promissory note for $1745, payable 90 days after date, made by B at the request of E, and for his accommodation, and by E taken to G, who endorsed it with E, and then delivered by G to M, who negotiated it with H for the sum of $1648, which was paid to E, is void for usury. *Sauerwein v Brunner*, 477

5. Where a note commences in usury; or in other words, where a note is tainted with usury at its birth, when it first becomes legally efficient and operative so as to give to the holder a right of action upon it, no subsequent holder, for a valuable consideration without notice of such usury, can maintain a suit upon it—such note being declared by statute null and void. *Ib.*

6. A note endorsed for the accommodation of the maker, and passed by him as a security for a usurious loan, is a usurious contract in its inception; as the lender is in fact to be considered the first holder of the note. *Ib.*

7. The terms "to negotiate a note," import the passing it for money; and to pass a note for money, means to transfer such note to another proprietor. *Ib.*

*See* Bill of Exchange.
—— Cause of Action 1.
—— Usage.

PURCHASE & PURCHASER.

*See* Sale and Purchaser 1.

PURCHASE MONEY.

*See* Conveyance 1.
—— Evidence 2.

## Q

QUESTION OF FACT.

*See* Law and Facts.

## R

RECEIPT.

1. A receipt of the purchase money, in a deed of conveyance of land, is only *prima facie* evidence of its payment. *Higdon, et ux. v Thomas*, 139

RECITAL.

*See* Declaration 2.
—— Statute of Fráuds 4.

RENT.

*See* Eviction 1.
—— Landlord & Tenant.
—— Rents & Profits.

RENTS & PROFITS.

*See* Court of Chancery 16, 17, 18.

REPLEVIN.

1. A surety in a replevin bond is not a competent witness for the plaintiff in replevin. *Sanderson's Ex'rs. v Marks*, 252
2. The declaration in replevin should not include any property not taken under the writ of replevin. *Ib.*
3. One joint owner of a chattel cannot maintain replevin against another. *M'Elderry, et al. v Flannagan*, 308

REPUTATION.

1. A tract of land may acquire, by reputation, a name different from that which it bears in the patent, and may pass by such acquired name. *Wall v Forbes*, 441

S

SALE & PURCHASE.

1. A sale by one trustee to his co-trustee, is illegal. *S. & T. Ringgold v M. Ringgold, et al.* 11

SCIRE FACIAS.

*See* Bail.
—— Pleading.

SECONDARY EVIDENCE.

*See* Evidence 22.

SECURITY FOR COSTS.

1. The court of appeals will not grant a rule on an appellant who has removed out of the state since the appeal, to give security for the costs of suit. *Berry v Griffith*, 440

SEPARATE CREDITORS.

*See* Joint & Separate Creditors.

SEPARATE DEBTS.

*See* Joint & Separate Creditors.

SEPARATE ESTATE.

*See* Joint & Separate Creditors.

SET OFF.

*See* Assumpsit 2.

SHERIFF.

*See* Bill of Sale 1.
—— Fieri Facias 1, 4, 5.

SIGNATURE.

*See* Statute of Frauds 1, 2, 3, 4.

SLAVES.

1. Where a vendor was exonerated from the delivery of a slave, then out of his possession, whom he had sold, and been paid for, and afterwards persuaded or enticed to abscond, so that the purchaser never got possession of him, no action can be maintained upon the contract of sale for a nondelivery, or to recover back the purchase money, as money had and received by him to the use of the vendee. Either action could have been maintained, if it had been the vendor's duty to deliver the slave, and he had refused. The proper remedy here is a special action on the case for persuading or enticing the slave to abscond. *Murphey v Barron*, 258

SPECIAL AUTHORITY.

*See* Commission & Commissioners 1.

SPECIAL BAIL.

*See* Bail.

STATUTE OF FRAUDS.

1. A liberal construction is to be given to the Statute of Frauds, 29 *Car.* II, *ch.* 3. In relation to the *fourth* section thereof, it is settled, that if the name of a party appears in the memorandum of a contract, and is applicable to the whole substance of the writing, and is put there by him or his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. Forms are not regarded, and the statute is satisfied, if the terms of the contract are in writing, and the names of the contracting parties appear. *Higdon, et ux. v Thomas*, 139
2. A technical authentication by signature is not necessary. *Ib.*
3. The phraseology of the *fourth* and *fifth* sections of that statute, as respects signing, is equally imperative, and substantially the same. *Ib.*
4. A bond, which recited the names of the parties to, and the terms of a contract for the sale of land, containing a condition to secure a performance of the contract, prepared and written by the vendee, who was also the obligee in the bond, executed by an agent of the vendor, and delivered by him to the vendee, is a sufficient signing within the *fourth* section of the Statute of Frauds. *Ib.*

*See* Evidence 6.

SURETY.

1. A surety in a replevin bond is not a competent witness for the plaintiff in replevin. *Sanderson's Ex'rs. v Marks,* 252

*See* Corporation.

T

TENANT.

*See* Landlord & Tenant.

TRESPASS.

1. The day laid in pleadings is frequently not material—as in trespass, where the injury charged may be proved to have been committed on a day before or after the time stated in the declaration; provided it appears to have been before the action was brought. *Union Bank of Maryland v Ridgely,* 324

TRUST & TRUSTEE.

1. Trustees empowered by deed to sell real estate, and with the proceeds pay debts and make investments in stock, are not authorised to exchange the trust property for other real property. By making such exchange, though with the best intentions, they are responsible for the full value of the property parted with *S. & T. Ringgold v M. Ringgold, et al.* 11
2. The policy of the law requires that the relation of trustee and *cestui que trust,* should be guarded with vigilance, and contracts between them scrutinized, that no injustice should be done to the *cestui que trust.* *Ib.*
3. Where a *cestui que trust* has undertaken to indemnify his trustee, a court of equity ought to be satisfied that he was free to act as a rational, intelligent man, not governed by considerations growing out of a dependent condition; otherwise the indemnities will be disregarded. *Ib.*
4. Where a trustee disposes of the title to lands, in violation of his duty, and the court has no other possible means of reinstating the *cestui que trust,* the trustee is responsible for the utmost value of the property disposed of; yet when the value of the property can be clearly ascertained, that must be the measure of the indemnity. *Ib.*
5. In the case of a mixture or confusion of property, from necessity the full value is given to the innocent party. *Ib.*
6. A sale by one trustee to his co-trustee, is illegal. *Ib.*
7. Where it was the duty of trustees to collect purchase money, and invest it, some of the trust estate being sold to T, a co-trustee, and S, another trustee, made no effort, at any period during the existence of the trust, to oblige his co-trustee to pay for his purchase, but suffered it to lie in the hands of T, when he, S, knew that the trust was abused, in consequence of a failure on T's part to apply the amount of the purchase money according to the trust—they are both responsible. *Ib.*
8. Where S and T sold personal property, with the assent of its owner, took bonds in their own names from the purchasers, collected a part of the purchase money, proffered themselves ready to account for such sales, made a return thereof as trustees, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which may be enforced in that court. *Ib.*
9. Where one trustee purchases a part of the trust estate, for which he was to pay at a stipulated period, and his co-trustee, under the circumstances, being jointly responsible with him for the principal, there is, of course, a joint responsibility for the interest. *Ib.*
10. Co-trustees are bound to know the receipts, and watch over the conduct, of each other. Where one trustee received trust funds applicable to outstanding debts which he did not pay; nor did he keep such funds separated from the mass of his estate, a co-trustee, who from his situation must know of such receipts, yet makes no effort to obtain them, or have them applied, is jointly chargeable for interest with his associate *Ib.*
11. Where trustees, transcending their powers, make investments in unproductive property, they are chargeable with interest. *Ib.*
12. Where property is conveyed to trustees, to be sold for the payment of debts, and the surplus to be invested in stocks to produce interest, which interest is specifically appropriated by the terms of the conveyance, and the proceeds of

such estate being in hand, it was the imperative duty of the trustees to have invested, unless a portion, or the whole, had been demanded by acknowledged debts; but where hopes were entertained by the trustees that a claim, then depending in chancery, would be perpetually enjoined, it having been litigated for several years, and no reasonable expectation of a speedy close, they were not justified in laying by the money, and waiting the event of a protracted chancery suit. In such a case, the trustees were grossly negligent, and must pay interest. *Ib.*

13. Compound interest will be allowed where a trustee is directed to invest funds, and to reinvest the dividends; or where the trust directs an accumulation, and the trustee has used the funds. Yet the ground of this allowance is the actual or presumed gain of the trustee by the use of the funds; and where the circumstances forbid the presumption of gain by the trustee, it will not be allowed. *Ib.*

14. To trustees who have invested, or made efforts to invest, trust funds, a rest of six months on their receipts, without interest, will be allowed as a reasonable time within which to invest; but where they manifested no disposition to make such application of their receipts, as the trust contemplated, no such rest is allowed. *Ib.*

15. By an equitable construction of, and by analogy to the statutes of this state, allowing commissions to executors, guardians, and trustees, under judicial sales, commissions may be allowed to conventional trustees, though there was no agreement between the parties to that effect. *Ib.*

16. Whether or not one co-trustee can be a witness for his co-trustee in an action against both? *Quere.* *Ib.*

17. An executor empowered by will to sell lands, having sold them in 1814, and put the purchaser in possession, it was his duty, if the sale was for *cash*, payment being refused, to have sued; if on *credit*, he ought, within a reasonable time, to have obtained bond and security for the purchase money; and at all events should have retained possession of the lands until the necessary security was given. Omitting to sue at law until 1819, he was *prima facie* guilty of gross negligence, and responsible, as a trustee would be, for the proceeds of the lands from the time of the sale, deducting his reasonable expenses and commission. *Hurtt v Fisher*, 88

18. A trustee, with power to sell, and having sold lands, being informed that a deed was required by the purchaser, to whom he had sold and given possession, and that the purchase money would be paid when the deed was executed, doubting his right to execute a deed, yet not obtaining a decree, ratifying his sale for four years, is bound to show the circumstances beyond his control, to justisy this delay. *Ib.*

19. A trustee is responsible for money lost by his gross negligence. *Ib.*

*See* Assumpsit 2.

**U**

USAGE.

1. A usage of universal prevalence becomes a part of the existing law, and is to be noticed *ex officio* by the courts of justice; but a particular usage has a circumscribed and limited application, and must be supported by proof. Where it is well established, it is obligatory on the objects of its operation as the general law. *The Bank of Columbia v Fitzhugh*, 239

2. Usage enters into contracts—becomes a part of them, and must be regarded in their interpretation. *Ib.*

3. Special usages control and govern the general law repugnant to them. *Ib.*

*See* Custom.

USURY.

*See* Promissory Note 4, 5, 6.

**V**

VARIANCE.

1. By the statutes of 21 *Jac. I, ch.* 13, 5 *Geo. I, ch.* 13, and our act of assembly of 1809, *ch.* 153, a variance between the writ and declaration is cured after verdict. *Giles, Adm'r. of Bacon, v Perryman*, 164

VENDOR & VENDEE.

*See* Contract 7.

—— Principal & Agent 1.

VERDICT.

1. After verdict in an action of *assumpsit* by an administrator, a defective allegation in the declaration of the promise to the administrator, and the death of the intestate, and an omission to make *profert* of the letters of administration, cannot be taken advantage of; though they might have furnished good causes of demurrer. *Vandersmith v Washmein's Adm'r.* 4

*See* Variance 1.

W

WARRANT OF RESURVEY.

1. In an action of covenant, where the plaintiff sued out a warrant of resurvey, and plots were returned, to establish his claim he cannot examine a witness as to the location of the lands on the plots, who was neither upon nor attended the survey. *Wall v Forbes,* 441

WIDOW.

*See* Alien.

*See* Feme Covert.

—— Husband & Wife.

WILL.

*See* Devise.

— Intestate 1.

WITNESS.

1. Whether or not one co-trustee can be a witness for his co-trustee in an action against both? *Quere. S. & T. Ringgold v M. Ringgold, et al.* 11

2. As a general rule, a person who has neither been examined upon, nor attended a survey of lands made under a warrant of resurvey issued by order of court, is not a competent witness to give evidence at the trial of the cause in relation to the locations made upon the plots. *Wall v Forbes,* 441

*See* Corporation 1, 2.

—— Evidence 22, 23, 24, 25.

WRIT OF ERROR.

*See* Appeal.

END OF THE FIRST VOLUME.

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